Massachusetts Department of Revenue
Division of Local Services

Current Developments in Municipal Law

2007

Court & Appellate Tax Board Decisions

Book 2

Henry Dormitzer, Commissioner
Robert G. Nunes, Deputy Commissioner

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Court & Appellate Tax Board Decisions

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JOHN BOOTHROYD & others [1] vs. ZONING BOARD OF APPEALS OF AMHERST & others. [2]

1 William Chase, Thaddeus Dabrowski, Althea Dabrowski, Konnie Fox, William Chase, Peter Geraty, Daphne Geraty, Zahava Koren, Israel Koren, Stephen Locke, Gina Fusco, Douglas Lowing, Karen Lowing, Jenny Marshall, Susan Pynchon, Robert Quinn, Nancy DiMattio, Irvin Rhodes, Penny Rhodes, Dana Toutant, Stephen Toutant, Sudhakar Vamathevan, Lynn Vennell, Stephen Walkowicz, Kelly Keane Walkowicz, and Sean Werle.

2 The town of Amherst; HAP, Inc.; and Richard S. Bogartz.

SJC-09896

SUPREME JUDICIAL COURT OF MASSACHUSETTS

449 Mass. 333*; *868 N.E.2d 83*; *2007 Mass. LEXIS 379

May 9, 2007, Argued
June 14, 2007, Decided

PRIOR HISTORY: [*1]**

Suffolk. Civil action commenced in the Land Court Department on February 1, 2002. Motions for summary judgment were heard by Alexander H. Sands, III, J.; the case was heard by him, and a motion to amend the judgment was also heard by him. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

COUNSEL: John E. Garber for the plaintiffs.

Donald R. Pinto, Jr., for Hap, Inc., & another.

David S. Weiss & Michael S. Rabieh, for Citizens' Housing and Planning Association & others, amici curiae, submitted a brief.

Juliana deHaan Rice, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Cordy, JJ.

OPINION BY: GREANEY

OPINION

[*334] [84]** GREANEY, J. We transferred this case here on our motion to decide whether the zoning board of appeals of Amherst (board), in granting a comprehensive permit under *G. L. c. 40B, §§ 20-23* (Act), permissibly could consider whether there was a "regional need" for affordable housing after the town of Amherst had fulfilled its low or moderate income housing obligation under the Act (minimum affordable housing obligation). [3] **[**85]** We conclude that the board properly took this consideration **[***2]** into account, and we affirm the judgment that upheld the grant of the comprehensive permit. We also affirm the order denying the plaintiffs' motion to amend the judgment.

3 A city or town has fulfilled its minimum affordable housing obligation "where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above." *G. L. c. 40B, § 20*. For an overview of the Act, see *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 814-816, 767 N.E.2d 584 (2002)*; *Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 345-346, 294 N.E.2d 393 (1973)* **[***3]** (*Hanover*).

The background of the case is as follows. The defendant HAP, Inc. (developer), is a nonprofit corporation that provides affordable housing services in western

Massachusetts. In May, 2001, the developer [4] applied to the board for a comprehensive permit under the Act to build twenty-six units of affordable **[*335]** rental housing on a 4.1 acre parcel of land off of Route 116 in Amherst. [5] The project would involve the construction of three detached buildings, each containing eight units of townhouse style housing; renovations to an existing farmhouse to create two new housing units; and the construction of an apartment for a resident manager within one of the new buildings. Two of the buildings would be three stories in height. Of the twenty-six units, the developer proposed three one-bedroom units, fourteen two-bedroom units, and nine three-bedroom units.

4 At the time of application, the developer held an option to purchase the property from its then owner, Richard S. Bogartz. The developer later exercised its option and purchased the property in the name of Butternut Properties Limited Partnership, an entity controlled by it.

5 In accordance with restrictions **[***4]** set forth in the Federal "Low Income Housing Tax Credits Program," the developer would not be able to rent affordable housing units to students.

The site for the proposed project comprises property located in the R-O, or outlying residence, district of the residential zone. [6] The property lies on the eastern edge of a neighborhood known as Orchard Valley, which contains approximately 275 single-family homes. The proposed project violates various provisions of Amherst's zoning bylaw, including those pertaining to minimum lot area, maximum lot coverage, maximum floors on buildings, and parking. In addition, the bylaw provision pertaining to residential uses prohibits townhouses and apartments in the outlying residence district. During the relevant time frame, Amherst had fulfilled its minimum affordable housing obligation within the meaning of the Act. [7]

6 The town has seven residential districts: "R-LD," low density residence; "R-F," fraternity residence; "R-O," outlying residence; "R-N," neighborhood residence; "R-VC," village center residence; "R-G," general residence; and "PURD," planned unit residential development. The stated purpose of the outlying residence district "is to provide **[***5]** for lower density residential areas. In general, the R-O District is intended to be a transitional area between the low density R-LD District and medium density R-N District." The remaining zoning districts include five business districts, two industrial-research park districts, one educational district, and five resource protection districts.

7 The parties stipulated that, at all relevant times, "low or moderate income housing," as defined in *G. L. c. 40B, § 20*, existed in Amherst that was in excess of ten per cent of the housing units reported in the latest Federal decennial census of the town. See note 3, *supra*.

Following numerous public meetings and hearings, and several revisions to the project, the board voted unanimously to grant the comprehensive permit, subject to various conditions. [8] On February 22, 2002, the board issued the comprehensive **[*336]** **[**86]** permit and a twelve-page decision. In its decision, the board concluded that the need for affordable housing in Amherst was not mitigated by the fact that the town had met its minimum affordable housing obligation. The board referred to a publication that concluded that an individual earning minimum wage would have to work ninety-seven hours **[***6]** per week to afford a two-bedroom apartment in Amherst. The board noted testimony presented to it that the vacancy rate in town is one per cent, and that 870 families are currently on the Amherst Housing Authority waiting list, having to wait three to six years for an affordable housing unit. The board concluded that the overwhelming need for affordable housing outweighed concerns about density, traffic, and other "constraints imposed by the zoning bylaw." The board went on to explain, detailing its reasoning, that the project would not have an adverse effect on the neighborhood.

8 The conditions included the following requirements: seventy per cent of the units were to be set aside for people who live or work in Amherst, twenty per cent of the units were to be "set aside for minority households," and all of the units were to be "100% affordable in perpetuity."

Pursuant to *G. L. c. 40B, § 21*, [9] the plaintiffs, residents of Amherst (including some abutters to the proposed project site), challenged the board's decision to grant the comprehensive permit by filing a complaint in the Land Court. The plaintiffs asserted that the town bylaw provisions could not be superseded by the Act, [10] that the board's **[***7]** decision was invalid due to prejudgment and conflict of interest on the part of at least one board member, and the board had exceeded its authority in granting the comprehensive permit. The parties filed cross motions for summary judgment on the applicability of the provisions of the bylaw after Amherst had satisfied its minimum affordable housing obligation. A Land Court judge denied the plaintiffs' motion and allowed the defendants' motion, concluding that the Act permits a local zoning board to override restrictive zoning laws in

its discretion even after a municipality has satisfied its minimum affordable housing obligation.

9 *General Laws c. 40B, § 21*, provides, in pertinent part, that "[a]ny person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in [*G. L. c. 40A, § 17*]."

10 In connection with this issue, the plaintiffs sought a declaration under *G. L. c. 231A*, and a determination of the bylaw provisions' validity pursuant to *G. L. c. 240, § 14A*.

[*337] Further proceedings and a trial followed on the remaining issues. The Land Court judge entered judgment in favor of the defendants, affirming the board's decision. In his decision, in which **[***8]** he made numerous factual findings, the judge rejected the plaintiffs' claim that the board had "no standard" for acting on the comprehensive permit application. The judge explained that the same standard -- whether the local bylaw is "consistent with local needs" -- applies in situations where the town's affordable housing stock is either below, or over, the ten per cent statutory threshold. In either situation, the board must weigh the requirements of the local bylaw against the need for affordable housing, taking into account various factors set forth in the definition of the term "consistent with local needs." The judge found that the developer had satisfied its burden of proof at trial concerning the relevant factors, and that the comprehensive permit was properly granted. He also concluded that the plaintiffs lacked standing to challenge the condition of the comprehensive permit that set aside twenty per cent of the units in the proposed project for minority households. See note 8, *supra*. A judgment entered consistent with the judge's decision.

The plaintiffs moved to amend the judgment, asserting that the judge had erroneously determined that they lacked standing. The motion was **[***9]** denied. The **[**87]** plaintiffs filed a notice of appeal from the judgment and decision following trial, and from the denial of their motion to amend the judgment.

1. The parties have framed the issue before us in differing terms. The plaintiffs expressly acknowledge, as they must, that a local board of appeals may override local "requirements and regulations" (local zoning laws) even when a municipality's minimum affordable housing obligation has been met. See *Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 354-355, 367 (1973)* (*Hanover*). [11] The issue, as articulated by the plaintiffs, is whether, in so doing, a local board of appeals **[*338]** may employ the "regional need test" of *G. L. c. 40B, § 20*. The plaintiffs argue that a board of appeals may not use this test, and that, instead, "[t]he usual zoning laws are imposed in the usual way," meaning, the applicant must apply for a special permit or variance to override the local zoning laws when a municipality has satisfied its minimum affordable housing obligation. We disagree.

11 The *authority* of a local board of appeals to override local "requirements and regulations," including zoning ordinances and bylaws (local zoning laws), **[***10]** was confirmed in *Hanover, supra at 354-355*. In the *Hanover* case, we examined a municipality's affordable housing obligation as set forth in an earlier version of *G. L. c. 40B, § 20*, and stated that the provisions "define precisely the municipality's *minimum* housing obligations" (emphasis added). *Id. at 366*. We went on to explain that, "once the municipality has satisfied its minimum [affordable] housing obligation, the statute deems local 'requirements and regulations,' including its restrictive zoning ordinances or by-laws, as 'consistent with local needs' and thereby enforceable by the board *if it wants to apply them*." *Id. at 367*. We do not view these statements as dicta, and it necessarily follows that the converse of what is quoted above is true. That is, where a municipality has satisfied its minimum affordable housing obligation, a local board of appeals is not required to enforce local "requirements and regulations," and nothing in the statute imposes such a mandate. To the extent that any ambiguity existed for this proposition, we now put it to rest. To conclude otherwise would frustrate the purpose of the Act. See *id. at 354*.

General Laws c. 40B, § 21, authorizes a board of **[***11]** appeals to grant or deny an application for a comprehensive permit. The plaintiffs correctly point out that nothing in *§ 21* indicates what standard a board of appeals should use to evaluate an application. The plaintiffs also correctly point out that this deficiency in the Act was addressed by us in the *Hanover* decision in our rejection of the claim that the lack of standards in the Act rendered it unconstitutionally vague, and in our conclusion that, construing the statute as a whole, the "consistent with local needs" standard of *§ 23* (and defined in *§ 20*) is the standard to be used by a local board of appeals in evaluating an application for a comprehensive permit. *Hanover, supra at 363-368*.

Section 20 of the Act defines the phrase "[c]onsistent with local needs," first providing:

> "[R]equirements and regulations shall be considered consistent with local needs if they are reasonable[[12]] in view of the

> regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing **[*339]** or of the residents of the city or town, to **[**88]** promote better site and building **[***12]** design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing."

12 In the *Hanover* decision, we explained that "the term 'reasonable' is surplus verbiage which does not add any substance to the 'consistent with local needs' standard." *Id. at 366 n.17.*

The plaintiffs refer to this portion of the definition as the "regional need test," and we shall adopt this terminology for purposes of discussion. The definition of "consistent with local needs" goes on to state in the second sentence that "[r]equirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town" where a municipality has fulfilled its minimum affordable housing obligation as therein defined, see note 3, *supra.*

The plaintiffs assert that the two sentences in the definition of "consistent with local needs" create two separate standards, and that when a municipality has satisfied its minimum affordable housing obligation, the local zoning laws, as a matter of law, cannot be bypassed (unless the applicant satisfies the standards **[***13]** for obtaining a variance or special permit), and that inquiry into the "regional need test," as set forth in the first sentence, is improper. The plaintiffs' argument is based on the difference between the first sentence of the definition of "consistent with local needs," which states that local zoning laws "shall be *considered consistent* with local needs" if they are reasonable in view of various factors, and the second sentence of the definition, which states that, when a municipality has satisfied its minimum affordable housing obligation, local zoning laws "*shall be consistent* with local needs" (emphases added). *G. L. c. 40B, § 20.*

We construe the provisions of the Act in connection with the purpose of its enactment and as a harmonious whole. See *Hanover, supra at 354, 364.* The second sentence of the definition of "consistent with local needs" sets forth "precisely the municipality's minimum [affordable] housing obligations." *Id. at 366.* The plaintiffs read too much into the absence of the word "considered" in the second sentence of the definition. A plain reading shows that, in circumstances where a municipality has failed to satisfy its minimum affordable housing obligation, the **[***14]** second sentence serves to foreclose a local board of appeals **[*340]** from claiming that its decision to deny a comprehensive permit (and to enforce local zoning laws) is consistent with local needs and therefore automatically enforceable on review. This is so because "the municipality's failure to meet its minimum [affordable] housing obligations, as defined in *§ 20*, will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Hanover, supra at 367.* Thus, contrary to the plaintiffs' contention, application of the second sentence, even when a municipality has satisfied its minimum affordable housing obligation, serves a purpose and does not render the minimum affordable housing obligation in *§ 20* "meaningless surplusage."

Nothing in the definition of "consistent with local needs" in *§ 20*, nor in other provisions of the Act, divests a local board of appeals of its authority to grant a comprehensive permit once a municipality satisfies its minimum affordable housing obligation. See note 11, *supra.* Use of the phrase "when imposed by" in the second sentence of the definition of "consistent with local needs," indicates that a local board **[***15]** of appeals has been given discretion to decide whether *or not* to impose local zoning laws. See *International Org. of Masters, Mates & Pilots v. Woods Hole, Martha's Vineyard & Nantucket S.S.* **[**89]** *Auth., 392 Mass. 811, 813, 467 N.E.2d 1331 (1984)* ("Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous"). Because, under the second sentence, local zoning laws are not consistent with local needs unless they are "imposed" "after [a] comprehensive hearing," local boards of appeals must deliberate about whether to impose or override local zoning laws when a municipality has satisfied its minimum affordable housing obligation. If local boards of appeals were prohibited in issuing comprehensive permits beyond the statutory minimum, it would be meaningless to hold a "comprehensive hearing." When a local board of appeals decides *not* to enforce its local zoning laws, the second sentence of the definition ceases to apply, leaving the board of appeals to find, essentially, that the local zoning laws are *inconsistent* with local needs as assessed from the only remaining benchmark in *§ 20*, namely, the regional needs test set forth in the first sentence **[***16]** of the definition of "consistent with local needs." Our **[*341]** conclusion is bolstered by the central, overriding concern of the Act: consistency with local needs.

This conclusion does not frustrate the purpose of the Act. A municipality's attainment of its minimum affordable housing obligation in many cases does not eliminate the need for affordable housing within its borders. Local autonomy is not compromised. Once a municipality meets its minimum affordable housing obligation, the local board of appeals may exercise its discretion to apply its local zoning laws, and the board is not required to grant a comprehensive permit. [13] See *Hanover, supra at 367*. Application of the regional needs test, however, ensures that local boards of appeal will balance the competing considerations involved.

13 Even when a municipality has not satisfied its minimum affordable housing obligation, a local zoning board is not required to grant a comprehensive permit. See *Hanover, supra at 366-367*; *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., 15 Mass. App. Ct. 553, 562-563 n.13, 446 N.E.2d 748 (1983)*.

Some final observations are in order. If the Legislature had intended, in circumstances where a municipality had **[***17]** satisfied its affordable housing obligation, for a board of appeals to revert to granting variances or special permits in overriding local zoning laws, it would have so provided and would not have empowered a board of appeals with "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section." *G. L. c. 40B, § 21*. We disregard the regulations cited by the plaintiffs because they only apply to appeals to the housing appeals committee by an applicant whose comprehensive permit application was denied or was granted with conditions the applicant alleges render the proposed project uneconomic. See *G. L. c. 40B, § 22*; *760 Code Mass. Regs. § 31.02(1)* (2004). Finally, our conclusion does not "needlessly infringe[]" on the "settled property rights of abutters." Rather, our conclusion takes into account that the Legislature "has clearly delineated that point where local interests must yield to the general **[***18]** public need for housing." *Hanover, supra at 383*.

[*342] 2. The plaintiffs maintain that the comprehensive permit is illegal because it contains an unconstitutional racial **[**90]** quota by requiring twenty per cent of the project's units to "be set aside for minority households." See note 8, *supra*. The plaintiffs base their claim of standing on the possibility that they, in the future, may "need to move to more affordable housing." "[U]nsubstantiated claims or speculative personal opinions" do not constitute a sufficient predicate on which to confer standing. [14] *Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass. App. Ct. 208, 212, 794 N.E.2d 1269 (2003)*.

14 We add as well that the issue is not ripe for review. Cf. *Lakeside Builders, Inc. v. Planning Bd. of Franklin, 56 Mass. App. Ct. 842, 849, 780 N.E.2d 944 (2002)* (claim not ripe because no "final authoritative determination" made). The comprehensive permit must be read together with the board's decision granting the comprehensive permit. In its decision, the board makes clear that the developer must apply to the Department of Housing and Community Development (department) for approval of the aspirational "set aside" for minority households. The board, therefore, appropriately deferred **[***19]** the issue to the department, the entity that the parties all agree is responsible for compliance with fair housing laws and regulations.

3. The judgment is affirmed. The order denying the plaintiffs' motion to amend the judgment is affirmed.

So ordered.

JOANNE CIOCH vs. TREASURER OF LUDLOW & others. [1]

1 The board of selectmen of Ludlow and the town of Ludlow.

SJC-09838

SUPREME JUDICIAL COURT OF MASSACHUSETTS

449 Mass. 690*; *871 N.E.2d 469*; *2007 Mass. LEXIS 587

April 6, 2007, Argued
August 10, 2007, Decided

PRIOR HISTORY: [1]**

Hampden. Civil action commenced in the Superior Court Department on October 1, 2001. The case was heard by C. Brian McDonald, J., on a motion for summary judgment. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment affirmed.

COUNSEL: Sandra C. Quinn for the plaintiff.

Michael K. Callan (David J. Martel, with him) for the defendants.

Patrick Neil Bryant, for Boston Police Patrolmen's Association, Inc., IUPA, AFL-CIO, amicus curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, & Cordy, JJ.

OPINION BY: MARSHALL

OPINION

[*690] MARSHALL, C.J. This appeal brings us to the intersection of the statutory health insurance system for retired municipal **[*691]** employees [2] and municipal fiscal considerations. [3] We are asked to consider whether *G. L. c. 32B* precludes a municipality from barring initial enrollment of an employee into its municipal health insurance plans after she has retired. [4] We conclude that because the broad authority afforded to a municipality does not require it to enroll retirees who were not plan participants on retirement, a municipality may follow a policy precluding participation by retirees who, although eligible for "contributory insurance" **[**2]** [5] on retirement, were not enrolled in one of the municipality's health insurance plans at that time. [6]

2 *General Laws c. 32B* is a local-option statute that governs health insurance benefits for active and retired employees of municipalities and other State political subdivisions, as well as the dependents of those employees. While we use the term "municipal" throughout this opinion, our analysis applies also to other political subdivisions covered by the statute. See *Yeretsky v. Attleboro, 424 Mass. 315, 316, 676 N.E.2d 1118 & n.4 (1997)*.

3 We are cognizant of legislation presently pending before the General Court that, if enacted, may affect municipal health insurance options. Among other things, the pending legislation proposes that municipalities be given an option to join the State's Group Insurance Commission (GIC) with respect to the provision of health care for coverage for active and retired employees. See 2007 House Doc. No. 3749, §§ 4-8 ("An Act establishing the municipal partnership act"); 2007 Senate Doc. No. 1584 ("An Act to promote quality and affordable municipal health insurance through the GIC"); 2007 House Doc. No. 2601 ("An Act to promote quality and affordable municipal health insurance **[**3]** through the GIC").

4 Although regulations promulgated by the GIC under *G. L. c. 32A* do not apply to municipalities or *G. L. c. 32B*, see, e.g., *McDonald v. Town Manager of Southbridge, 39 Mass. App. Ct. 479, 482, 657 N.E.2d 1285 (1995)*, *S.C., 423 Mass. 1018, 672 N.E.2d 10 (1996)*, for simplicity we use various terms as they are defined in those regulations. In that regard, we use the terms "retired employee" and "retiree" to mean a "former employee in the service of the [municipality], whose services have ended, and who is eligible for and actually receives a retirement or pension allowance." *805 Code Mass. Regs. § 1.02* (1996) (defining term for purposes of regulations applicable to *c. 32A*). See *G. L. c. 32, § 3 (1) (a) (ii)* ("Member Inactive" defined as employee whose

employment has been terminated, and who is receiving retirement allowance, or who is otherwise on authorized leave without pay, and "who may be entitled to any present or potential retirement allowance," although not then receiving such allowance); *G. L. c. 32, § 10 (3)* (deferring receipt of retirement allowance).

5 "Contributory Insurance" refers to "[i]nsurance which provides for a contribution of a part of the premium by the insured and a contribution of **[**4]** a part of the premium by his Employer." *805 Code Mass. Regs. § 1.02*.

6 Municipal regulation of participation and enrollment into municipal health insurance plans by a "deferred retiree" is not before us. See *805 Code Mass. Regs. § 1.02* ("An Employee whose services terminate and who has vested rights to a retirement allowance relating to this employment which are currently deferred. The [GIC] regards such a person as an employee on leave of absence without pay, only as long as the Employee retains the right to receive a retirement allowance at some future date").

1. *Background.* After some twenty-two years as a Ludlow **[*692]** public school teacher, the plaintiff, Joanne Cioch, retired in June, 1994, at the age of fifty-five years. See *G. L. c. 32, § 5*. The record suggests that, at that time, Cioch "elected to continue her life insurance on retirement." [7] With respect to health insurance, however, she did not enroll in the town's public employee group insurance plan. Rather, during her tenure as an active public employee and on her retirement Cioch was enrolled in her husband's health insurance plan. When Cioch's husband retired in 1997 -- about three years after her own retirement -- the couple **[**5]** was no longer eligible for his employer's insurance program, and they purchased private health insurance.

7 Under the regulations concerning insurance for State employees, "[e]mployees and retirees other than Elderly Governmental Retirees are required to be enrolled in the [GIC's] Basic Life Insurance Program in order to be eligible for health coverage." *805 Code Mass. Regs. § 9.03* (1996).

After reading an article in a newsletter for retired persons, [8] in October, 1999, Cioch inquired of the town treasurer whether she "could be enrolled in a Town health insurance plan." She received no response either to that query or to subsequent inquiries and, in December, 1999, requested and received enrollment forms for the town's retiree group health insurance program, specifically for the health maintenance organization, Health New England. On the form she submitted to the town, Cioch requested individual enrollment and indicated that "[i]f, in the future, spouses are allowed to join," her husband would elect coverage. She also indicated that neither she nor her husband was enrolled in Medicare. [9] When Cioch learned in April, 2000, that the town had not acted on her application, she persisted in **[**6]** her enrollment efforts through the summer of 2000.

8 Cioch identified the newsletter as the "MTA Reporter," which we assume is a publication of the Massachusetts Teachers' Association. A copy of the publication is not part of the record.

9 There is no evidence that Cioch applied for any other municipal health insurance plan, such as an indemnity plan, pursuant to *G. L. c. 32B, § 9*.

There is no dispute that Cioch made no preretirement inquiry **[*693]** concerning postretirement health insurance eligibility, or that she was not affirmatively told that, if she was not enrolled in the town's health insurance program on retirement, she would be eligible or ineligible to enroll thereafter. Nothing in the record indicates, however, that Cioch believed she was entitled to postretirement enrollment at any time before reading a publication of an entity not connected to the town some years after both she and her husband had retired; to the contrary, the couple had purchased private health insurance after her husband retired. [10], [11] While the town appears to have had no written policy concerning postretirement enrollment at the time Cioch retired, there is no suggestion that it permitted such enrollments, or **[**7]** that its employees understood that it would do so.

10 We do not consider whether or how the town would apply its preretirement enrollment policy to deferred retirees -- employees whose employment has been terminated, but "who may be entitled to any present or potential retirement allowance," *G. L. c. 32, § 3 (1) (a) (ii)* (inactive members), although not then receiving such an allowance. See *G. L. c. 32, § 10 (3)* (deferring receipt of retirement allowance).

11 Similarly manifesting the lack of any general perception among municipal employees of any postretirement eligibility for employees who were not enrolled in the town's group health plans during their employment or on retirement is that only one retired employee other than Cioch has attempted to enroll in the town's health insurance plan after retirement. The town denied reenrollment to that retiree, despite the fact that he had

been enrolled on retirement, but cancelled his coverage about eight years later.

By October 12, 1999, before Cioch either made any inquiries concerning, or submitted, her group health insurance application, the town's board of selectmen (board) formalized a written "Policy on Health Insurance," [12] generally communicating **[**8]** that enrollment in the town's group health insurance program on retirement was a predicate to coverage during retirement. [13] The policy provides, in pertinent part:

> "Eligibility. Regular employees of the Town (whether employed, appointed or elected) whose normal workweek **[*694]** is twenty (20) or more hours per week are eligible for health insurance benefits provided by the Town.
>
> "Enrollment. Enrollment in the health insurance plans offered by the Town is limited to eligible employees, the legal spouse, and their dependent unmarried children . . . .
>
> "Retirees. Any employee retired by the Town under the current pension plan or who receives retirement income as a result of their employment with the Town shall be eligible to enroll in the Blue Cross/Blue Shield Blue Care 65 Plan, Blue Cross Blue Shield Medex Plan or Health New England MedWrap Plan upon attaining age 65, if they are eligible for Medicare. If a retiree is not eligible for Medicare, the employee will continue on the plan they were last enrolled in with the Town. The Town will pay 50% of the premium for the plan and the retiree will pay 50% of the premium." [14]

12 The written policy apparently surfaced after the town filed its opposition **[**9]** to Cioch's motion for summary judgment, and her motion for reconsideration. The town's oppositions to those motions referred only to a long-standing practice or policy requiring preretirement enrollment.

13 The minutes of the meeting of the board on October 12, 1999, at which the policy was adopted, reflect that the policy was an "effort at putting together the Board's practices."

14 Several years later, on October 6, 2003, the town meeting added a group insurance benefit bylaw. It provides: "RETIREES. Any employee retired by the Town under the current pension plan as a result of their employment with the Town shall be eligible to continue as a participant in the group health insurance plans offered by the Town's carrier provided he/she was enrolled in a plan on the date of retirement."

On October 1, 2001, Cioch filed a complaint against the town, as well as its treasurer, the board, and the board's chairman; she filed an amended complaint on July 17, 2004. She sought a declaration that the defendants had violated the "state public employee retirement law, in particular *G. L. c. 32B, §§ 9 & 16*, by [their] refusal to enroll [Cioch] in the Town's retiree group health insurance program," an **[**10]** order requiring that she be enrolled in the plan of her choice, and damages, as well as costs and attorney's fees pursuant to *G. L. c. 231, § 6F*.

After various preliminary proceedings, the Superior Court judge considered Cioch's motion for entry of judgment, and the defendants' request for findings of fact and rulings of law, on stipulated facts and exhibits. Treating the motion as one for summary judgment, he denied Cioch's motion, and entered judgment for the defendants, concluding that the town's regulations were properly adopted and that when Cioch first applied **[*695]** for enrollment in the town's health insurance programs in December, 1999, she was ineligible under the terms of the town policy. [15] Cioch filed a timely notice of appeal, and we transferred the appeal to this court on our own motion. [16]

15 We do not address Cioch's claim that her denial of enrollment in the town's health insurance program is inconsistent with the terms of a collective bargaining agreement. While the parties stipulated that the applicable agreements contained no provision stating "if teachers covered by those agreements did not enroll in the Town's group health insurance program by the time they retired, they **[**11]** would forfeit their right to enroll," no such agreement has been made part of the record. We are therefore unable to determine what, if any, grievance procedures were required to be undertaken by Cioch. See *Johnston v. School Comm. of Watertown, 404 Mass. 23, 25, 533 N.E.2d 1310 (1989)*, quoting *Balsavich v. Local Union 170, Int'l Bhd. of Teamsters, 371 Mass. 283, 286, 356 N.E.2d 1217 (1976)* ("Employees may not simply disregard the grievance procedures set out in a collective labor contract and go direct to the court for redress against the

employer. . . . They must initiate the grievance procedures as the contract provides . . .").

16 Shortly after we transferred the case here we solicited amicus briefs. We acknowledge the amicus brief filed by the Boston Police Patrolmen's Association, Inc., IUPA, AFL-CIO. Because we conclude that *G. L. c. 32B, § 16*, does not forbid a municipality from precluding postretirement enrollment in its health insurance programs, we need not rule on the town's motion to strike the brief.

2. *Discussion*. Where the Superior Court judge has decided the case on stipulated facts and agreed exhibits, all questions of law and fact are open to our decision on review. See *American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Board of Health of Athol, 446 Mass. 310, 322, 844 N.E.2d 231 (2006)*. **[**12]** Under the *Home Rule Amendment, art. 89 of the Amendments to the Massachusetts Constitution*, the Commonwealth's various municipalities may undertake certain health insurance obligations to their employees. *G. L. c. 32B*. See *Yeretsky v. Attleboro, 424 Mass. 315, 316, 676 N.E.2d 1118 (1997)*. The town has voted to accept that responsibility and, among other provisions, has accepted *G. L. c. 32B, § 16*, thereby requiring it to "enter into a contract . . . to make available the services of a health care organization to certain eligible and retired employees and dependents . . . of such active and retired employees, on a voluntary and optional basis, as it deems to be in the best interest of the governmental unit and such eligible persons. . . ." Id. See *Ludlow Educ. Ass'n v. Ludlow, 31 Mass. App. Ct. 110, 113 n.5, 644 N.E.2d 227 (1991)*. The town offers several group insurance plans for active and retired **[*696]** municipal employees, including teachers. The parties do not dispute that a town may regulate participation in such a plan, provided such regulations are both reasonable and properly adopted. See *McDonald v. Town Manager of Southbridge, 423 Mass. 1018, 672 N.E.2d 10 (1996)*. The question here is whether a town may, consistent with its obligations **[**13]** under *G. L. c. 32B*, adopt a policy or regulation precluding postretirement enrollment of retirees in such a health insurance plan who were not enrolled in the plan on retirement.

The decision in *McDonald v. Town Manager of Southbridge, 39 Mass. App. Ct. 479, 657 N.E.2d 1285 (1995), S.C., 423 Mass. 1018, 672 N.E.2d 10 (1996)*, provides a starting point for our analysis. There, the issue was whether a statute, *G. L. c. 32B, § 9* (municipal obligations with respect to group indemnity health insurance programs), precludes a retired municipal employee from enrolling, postretirement, in a municipal indemnity group health insurance plan. [17] The Appeals Court concluded that, "at least until the town issues regulations to the contrary, *§ 9* does not require participation by the employee at the time of retirement to obtain coverage thereafter." *Id. at 483*. On further review, we clarified "that a municipality may adopt reasonable regulations, see *G. L. c. 32B, § 14* (1994 ed.), as has been done under *G. L. c. 32A, § 3* (1994 ed.), concerning participation in a municipality's program under *G. L. c. 32B* (1994 ed.) by a retiree who was not a participant in such a program at the time of retirement." [18] *McDonald v. Town Manager of Southbridge, 423 Mass. 1018, 1018, 672 N.E.2d 10 (1996)*.

17 Although **[**14]** the present case involves health insurance provided by an health maintenance organization under another section of the statute, *G. L. c. 32B, § 16*, we construe *G. L. c. 32B, §§ 9* and *16*, to the extent possible, in a consistent manner. See, e.g., *Yeretsky v. Attleboro, 424 Mass. 315, 319, 676 N.E.2d 1118 (1997)*.

18 Cioch's argument that *G. L. c. 32B* gives a municipality "no discretion" to decline to enroll a retiree into its group health insurance plan, and makes it "mandatory" to do so, is based on a flawed reading of *McDonald v. Town Manager of Southbridge, 39 Mass. App. Ct. 479, 657 N.E.2d 1285 (1995)*. The Appeals Court's decision in that case rejected the town's argument that *G. L. c. 32B, § 9*, precluded it from enrolling, postretirement, a retiree into its group health insurance plan. It did not address whether a town could regulate postretirement eligibility. Our decision, on further appellate review, made clear that such regulation is permissible. *McDonald v. Town Manager of Southbridge, 423 Mass. 1018, 672 N.E.2d 10 (1996)*.

Given that *G. L. c. 32B* establishes a sparse framework for **[*697]** provision of public employee insurance, there is nothing unreasonable about the town's defining eligibility for that insurance, or conditioning eligibility **[**15]** on preretirement or at retirement participation. When construing statutes such as *c. 32B*, we "attempt to ascertain and carry out the intent of the Legislature. *Baker Transp., Inc. v. State Tax Comm'n, 371 Mass. 872, 877 n.11, 360 N.E.2d 860 (1977)*. To that end we examine the whole statute with attention to the language used, the evil to be remedied, and the object to be accomplished by enactment." *Hayon v. Coca Cola Bottling Co. of New England, 375 Mass. 644, 648, 378 N.E.2d 442 (1978)*. See *Yeretsky v. Attleboro, supra at 319*. In enacting *G. L. c. 32B*, the Legislature generally intended to "enabl[e] each community which votes to accept the statute to contract for and contribute to a program of insurance for its employees," *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Chat-*

ham, 404 Mass. 365, 367, 535 N.E.2d 597 (1989), to "gather[ ] employees in large groups to facilitate bargaining for and administering insurance coverage," *id. at 369*, citing *Municipal Light Comm'n of Taunton v. State Employees' Group Ins. Comm'n, 344 Mass. 533, 539, 183 N.E.2d 286 (1962)*, and to provide a "comprehensive scheme of [health insurance] coverage" for public employees. See *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Chatham, supra at 368*; **[**16]** *McDonald v. Town Manager of Southbridge, 39 Mass. App. Ct. 479, 480-481, 657 N.E.2d 1285 (1995)*. See *G. L. c. 32B, § 1* ("purpose of this chapter is to provide a plan of group . . . health insurance").

As a local-option statute, however, *G. L. c. 32B* is "effective in a city and town only when the municipality votes to adopt its provisions," *Yeretsky v. Attleboro, supra at 316-317*, and a municipality is permitted to adopt "only those provisions of the statute that best accommodate its needs and budget." [19] *Id. at 317*. While the statute establishes the broad requirements for **[*698]** participating municipal insurance programs, it otherwise accords municipalities substantial latitude in the adoption of "such rules and regulations, not inconsistent with this chapter, as may be necessary for the administration of this chapter." *G. L. c. 32B, § 14*. See *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Chatham, supra at 367* ("A community is bound by expressly stated constraints in setting up its program, but is given broad authority to act within those constraints"). [20]

19 Both Cioch and the town argue that there are economic benefits to be derived from their respective positions. Given our conclusion **[**17]** that the Legislature has left it largely to municipalities to design and implement their health programs, we do not consider the possible economic impact of the municipality's choices in this case. Likewise, while Cioch argues that postretirement health insurance benefits are necessary to attract employees into public service, we note only that such benefits are available to attract such employees, but they must comply with eligibility requirements.

20 This authority is similar to that granted to the GIC, *G. L. c. 32A, § 3*, as administrator of *G. L. c. 32A*. See *G. L. c. 32B, § 16* (municipality may adopt "such rules and regulations as may be necessary for the administration of this section"). While the GIC has promulgated more inclusive eligibility regulations than the town has adopted, see *805 Code Mass. Regs. § 9.20* (1996) (permitting retirees to apply for enrollment postretirement, but not automatically extending coverage), they are not the only reasonable eligibility requirements. The Legislature has given each "appropriate public authority in each governmental unit" discretion to fashion a program of insurance meeting its needs, *G. L. c. 32B, § 14*, and requiring participation at **[**18]** the time of retirement is not inconsistent with the statute.

Nothing in the plain language of *G. L. c. 32B, §§ 9* or *16*, requires a municipality to permit a retiree who has not enrolled in a municipal health insurance plan while employed, to enroll in a municipal health insurance plan after she has retired, or precludes it from doing so. [21] *McDonald v. Town Manager of Southbridge, supra at 480*. *Chapter 32B* addresses the broad requirements with which a municipal health insurance group policy must comply, including the periods (i.e., active employment and retirement) for which it must offer coverage. See *id. at 481*. It does not, however, define individual eligibility. The requirement in *§ 9* that "the group general or blanket insurance . . . shall be continued" refers not to compulsory insurance coverage for individual retirees, but rather "mandates that the period covered by group policies shall continue through retirement without specifying whether a retired employee has to be **[*699]** covered prior to retirement." *Id. at 481*. While *G. L. c. 32B, § 16*, is not identical to *§ 9*, its requirement that a municipality "make available the services of a health care organization to certain eligible and **[**19]** retired employees," similarly obligates a municipality to contract for coverage for eligible retirees.

21 In keeping with the noncoercive nature of the statutory scheme, not only are municipalities not obliged to accept the provisions of *G. L. c. 32B*, but once they have, employees are not obligated to accept coverage. *Municipal Light Comm'n of Taunton v. State Employees' Group Ins. Comm'n, 344 Mass. 533, 539, 183 N.E.2d 286 (1962)* (while Legislature could force insurance on public employees, *G. L. c. 32B, § 4*, permits employees to opt out). *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Chatham, 404 Mass. 365, 369-370, 535 N.E.2d 597 (1989)*.

Undoubtedly, a municipality may not enact a bylaw, policy, or regulation that is inconsistent with State law. See, e.g., *TBI, Inc. v. Board of Health of N. Andover, 431 Mass. 9, 19, 725 N.E.2d 188 (2000)*; *Boston Gas Co. v. Somerville, 420 Mass. 702, 703, 652 N.E.2d 132 (1995)*. But *G. L. c. 32B, § 16*, if accepted by a municipality, requires only that a municipality obtain a health insurance policy or policies providing coverage for "eligible" retirees. See *Yeretsky v. Attleboro, supra at 322-323 & nn.15-16*. The Legislature's use in *§ 16* of the language "certain eligible and retired employees" **[**20]** leaves it

to individual municipalities to define the appropriate class. See *Shea v. Selectmen of Ware, 34 Mass. App. Ct. 333, 336-337, 615 N.E.2d 196 (1993)* (public authority has substantial authority to make and change eligibility requirements). The town accordingly is free to adopt a policy limiting enrollment to active employees, provided the policy provides for continued coverage of those employees during their retirement, as the statute requires.

We similarly reject Cioch's contention that application of the town's policy to her constitutes an improper retroactive denial of health insurance benefits: Cioch has not demonstrated that she has been denied in retirement any benefit she earned as an active employee. Specifically, she has not shown either that the benefits she earned as an active town employee included the right to enroll in the insurance program after retirement, cf. *Gordon v. Safety Ins. Co., 417 Mass. 687, 689, 632 N.E.2d 1187 (1994)* ("When policy language identifying those to whom coverage is afforded constitutes part of the basic insurance agreement, a person claiming coverage . . . must demonstrate that he is an insured"); *McDonald v. Town Manager of Southbridge, supra at 479* (plaintiff's burden **[**21]** to demonstrate eligibility for coverage), or that her failure to enroll in the program was in reliance on any representation by the town concerning future eligibility. Indeed, the parties stipulated that Cioch did not "discuss health insurance benefits upon her retirement with any representative **[*700]** of the school department," and she does not allege that the town made any representation about postretirement eligibility. [22] The record demonstrates no expectation of postretirement eligibility on Cioch's part.

> 22 In contrast, it appears that another retiree, who was enrolled in the town's health insurance plan on retirement, was permitted to add coverage for his wife postretirement. In that case, however, there were allegations that an employee in the town treasurer's office led the employee to a belief that the wife could be added during a future enrollment period.

Certainly, *G. L. c. 32B* does not preclude postretirement enrollment, see *McDonald v. Town Manager of Southbridge, supra at 479*, and it does permit the town's active employees to continue their health insurance coverage during retirement. *Id.* But nothing in the record supports the notion that Cioch, as a retiree, is entitled to benefits **[**22]** available to active employees. Cf. *Larson v. School Comm. of Plymouth, 430 Mass. 719, 724, 723 N.E.2d 497 (2000)* (health insurance "is an unearned benefit, no different in concept from holidays, future sick leave, or other similar benefits"). While Cioch's appellate brief is replete with language to the effect that the town's policy causes the "forfeiture" of a substantive right, she has not established forfeiture of rights she had as a retiree. The town's policy, first reduced to writing in 1999, has the effect of denying enrollment to retirees who were not enrolled at the time of retirement. But Cioch has not demonstrated that the policy was applied retroactively to deny her benefits to which she otherwise would have been entitled.

3. *Conclusion.* The decisions of this court and the Appeals Court in *McDonald v. Town Manager of Southbridge, 39 Mass. App. Ct. 479, 657 N.E.2d 1285 (1995), S.C., 423 Mass. 1018, 672 N.E.2d 10 (1996)*, built on prior decisions establishing the broad authority of municipalities to regulate the terms of their health care plans within the statutory framework. See, e.g., *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Chatham, 404 Mass. 365, 367, 535 N.E.2d 597 (1989)*; *Shea v. Selectmen of Ware, supra.* **[**23]** In the more than ten years since *McDonald v. Town Manager of Southbridge, supra*, the Legislature has not amended the statute to limit that discretion. Accordingly, we conclude that the town properly may proscribe postretirement enrollment in its *G. L. c. 32B* **[*701]** health care plans, by limiting eligibility for enrollment to active employees.

Judgment affirmed.

WILLIAM J. DEVINE, trustee, [1] vs. TOWN OF NANTUCKET & another. [2]

1 Of the Loomis Realty Trust.

2 Building commissioner for the town of Nantucket.

SJC-09837

SUPREME JUDICIAL COURT OF MASSACHUSETTS

449 Mass. 499*; *870 N.E.2d 591*; *2007 Mass. LEXIS 510

April 3, 2007, Argued
July 19, 2007, Decided

PRIOR HISTORY: [1]**

Nantucket. Civil action commenced in the Superior Court Department on August 28, 2001. The case was heard by Daniel A. Ford, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment affirmed.

COUNSEL: Robert D. Hillman for town of Nantucket.

Philip H. Graeter (J. Owen Todd with him) for the plaintiff.

Henry H. Thayer, for Real Estate Bar Association for Massachusetts, Inc., & another, amici curiae, submitted a brief.

Michael E. Malamut, Martin J. Newhouse, & Jo Ann Shotwell Kaplan, for New England Legal Foundation, amicus curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, & Cordy, JJ.

OPINION BY: MARSHALL

OPINION

[*500] MARSHALL, C.J. In 1968, the town of Nantucket (town) took certain property (locus) by eminent domain for purposes related to Nantucket Memorial Airport (airport). At that time the locus was listed as "owners unknown" on the town's tax rolls, even though there was in fact an identifiable record owner. In 1985, an attorney acting on behalf of William J. Devine, trustee of the Loomis Realty Trust (trust), purchased the record owner's title and subsequently conveyed it to the trust. Neither the record owner, the attorney, nor Devine **[**2]** had actual notice of the 1968 taking. Nor could the order of taking have been found in the chain of title to the locus by searching the grantor index. Further, after the 1985 purchase, the town restored the locus to the tax rolls, assessed and collected taxes on it, commenced tax takings, allowed a tax abatement, and issued building permits to Devine for construction on the locus. The question presented is whether in these circumstances Devine, as trustee, has good title to the locus.

Devine commenced this action in the Superior Court, seeking an order to quiet title to the locus, as well as other relief. After a jury-waived trial, a judge in the Superior Court made careful and comprehensive findings of fact and rulings of law, pursuant to which a judgment entered declaring that Devine, as trustee, "is owner in fee simple of the Locus" and that "[p]ursuant to *G. L. c. 240, § 6*, title to the Locus is hereby quieted and established to be in" him. The town appealed, and we transferred the case here on our own motion. [3] We affirm. [4]

3 The Superior Court judge also dismissed Devine's claims against the Nantucket building commissioner because no evidence concerning any such claims had been **[**3]** presented at trial. Devine cross-appealed, but that ruling has not been challenged on appeal.

4 We acknowledge the amicus briefs of the New England Legal Foundation; the Real Estate Bar Association for Massachusetts, Inc.; and the Abstract Club.

1. *Facts*. We begin with the judge's findings, which we accept unless they are clearly erroneous. *Mass. R. Civ. P. 52 (a)*, as amended, 423 Mass. 1402 (1996). See, e.g., *Kendall v. Selvaggio, 413 Mass. 619, 620, 602 N.E.2d 206 (1992)*, and cases cited. The locus consists of

[*501] a parcel of land, of approximately 25,000 square feet, identified as Lots 17-26 of block 285 as shown on a plan entitled "Plan of the Nobadeer Section of Surf-side, Nantucket, Mass., made by Codd & Allen Surveyors," dated May, 1890. The locus is also identified as parcel no. 62 on sheet 88 in the records of the town's assessor of taxes. The locus was once part of a large parcel of land owned by the Nantucket Surfside Company. In 1889, the trustees of that company executed a foreclosure deed to Francis Doane, who in turn conveyed the large parcel to Seth Doane. Seth Doane then conveyed the large parcel to Daniel McKeever, who subdivided the large parcel and recorded the Codd & Allen plan. McKeever **[**4]** conveyed the locus to George L. Loomis by a deed dated May 9, 1890, recorded in the Nantucket registry of deeds.

In 1923, or shortly before, Loomis died and left a will in which he devised the locus to his sisters, Mary Loomis and Caroline Loomis. The will was probated in Somerset County, New Jersey, where Loomis apparently was living at the time of his death. No ancillary probate proceedings were ever commenced in Nantucket County. Mary Loomis and Caroline Loomis conveyed the locus to Lewis Popham Carmer by a deed dated November 22, 1923, and recorded in the Nantucket registry of deeds. The deed from the Loomis sisters to Carmer was listed in the grantor index under the names "Mary Loomis" and "Caroline Loomis." That was the only deed from anyone named "Loomis" listed in the grantor index from 1980 back to 1923. No other conveyances from persons named "Loomis" appeared in the grantor index.

For unknown reasons, the locus was removed from the town's tax rolls sometime after 1923. According to the former town counsel, the town's tax records are not historically accurate. Some parcels of property simply dropped off the tax rolls in the 1920's and 1930's, particularly in the Surfside area **[**5]** of the town. When that happened, the property was listed in the tax records as "owners unknown."

The locus is in close proximity to the airport, at the southern end of a runway. Members of the Nantucket Airport Commission (commission) have for some time considered it advantageous to acquire property near the airport in order to prevent construction in that area. On September 10, 1968, the commission voted to **[*502]** take the locus by eminent domain. An order of taking reflecting that vote was recorded in the registry of deeds on October 3, 1968. The order of taking indicates that the commission acquired an "avigation easement" over two parcels (parcels 1 and 2) and a fee simple interest in two other parcels (parcels 3 and 4). Parcel 3 is described as "[l]and shown as Block 285 on Plan of Surfside lots recorded in Nantucket Registry of Deeds. Present owners unknown," and includes the locus. The order of taking also indicates that the sum of $ 1,000 was awarded for the taking of parcel 3.

On June 24, 1970, the commission recorded an amended order of taking. The reason for that amendment was "to clarify the [a]vigation [e]asement and describe the rights taken therein." That amendment did not affect **[**6]** the locus, which was again described as "Land shown as Block No. 285 on Plan of Surfside Lots recorded in the Nantucket County Registry of Deeds."

On December 8, 1970, the commission recorded another amended order of taking. The reason stated for this amendment was that "possibly some requirements of the pertinent statutes of the Commonwealth were not complied with." In that amended order of taking, parcel 3 was described as, "Land shown as Block *265* on Plan of Surfside [l]ots recorded in Nantucket County Registry of Deeds" (emphasis added). However, the December, 1970, amendment specifically referenced both the original 1968 order of taking and the June, 1970, amendment. The judge found that the reference to "Block 265," rather than "Block 285," in the December, 1970, amendment was a scrivener's error and that anyone who examined the original order of taking and the two amendments would see that the December, 1970, amendment contained an error. Those findings have not been challenged on appeal.

The December, 1970, amendment also provided that the sum of $ 200, rather than $ 1,000, was awarded for the taking of parcel 3. That discrepancy is not explained on this record, but it is immaterial **[**7]** to our decision. Because the takings were considered to be from "owners unknown," there was no reference to the takings in any of the grantor indices of persons in the chain of title **[*503]** to the locus, up to and including Carmer, the individual who had acquired the locus from the Loomis sisters in 1923. [5]

> 5 The 1968 order of taking and the June, 1970, amendment both listed the commission as the grantor of the locus, an obvious error. The December, 1970, amendment erroneously listed as grantor an individual who had discharged a mortgage on a parcel unrelated to the locus.

Prior to trial, representatives of the town searched the commission's files for records pertaining to the taking and were not able to find any. Nor were they able to locate minutes of the commission's meetings in 1968 or 1970. Therefore, there was no evidence as to what the commission actually did to effect the taking, other than the current (at the time of trial) commission chairman's testimony that he thought the town would have done "whatever is necessary for the taking." The judge inferred that, at the time of the taking, the town did little to

ascertain the true owner of the locus. It may have done little more than check **[**8]** the tax records, which listed the owner of the locus as unknown. The judge also found that, for reasons that will be discussed later in greater detail, a reasonably prudent title examiner in 1968 would have found the 1923 deed conveying the locus to Carmer, and that, if the town had examined the grantor index for deeds from the subdivider (McKeever), it would have discovered that the record owner in 1968 was Carmer.

Devine is an experienced genealogist and has particular skills in finding both flaws in land titles and persons who may be heirs with standing to assert rights in connection with such flaws. He conducts business under the name Genealogical Search, Inc. As he testified, his business is to "try to clear up titles when [he] find[s] out they are either tax title properties or they could be owners unknown property." Devine's normal practice in the 1980's was to locate an heir who would have standing to assert a claim with respect to a title defect, and then propose to that heir that a joint venture or partnership be established in order to assert the heir's rights, with Devine agreeing to pay all legal fees and costs associated with the potential litigation. If the claim was **[**9]** successfully concluded, Devine and the heir would divide the profit equally. [6]

> 6 The judge took judicial notice that Devine's business practices are well documented in the courts of this Commonwealth. See, e.g., *Christian v. Mooney, 400 Mass. 753, 511 N.E.2d 587 (1987)*; *Robertson v. Plymouth, 18 Mass. App. Ct. 592, 468 N.E.2d 1090 (1984)*; *Krueger v. Devine, 18 Mass. App. Ct. 397, 466 N.E.2d 133 (1984)*; *Allen v. Batchelder, 17 Mass. App. Ct. 453, 459 N.E.2d 129 (1984)*. Those practices have no bearing on Devine's rights with respect to the locus, as Devine purchased Lewis Popham Carmer's interest outright rather than entering into a partnership with him, and did not commence litigation for some sixteen years thereafter, when the town informed him of the 1968 taking.

In 1985, Paul Vozella, an attorney who performed title **[*504]** services for Devine, brought the locus to Devine's attention, possibly because it was still listed as "owners unknown" in the town's tax records. Devine commissioned him to perform a title search, and thereafter Vozella informed Devine that Carmer was the record owner of the locus. Devine contacted Carmer by telephone and proposed a joint venture to him. Carmer responded that he was not interested in a joint venture, but that he would **[**10]** sell the locus to Devine for $ 7,500. Devine agreed and instructed Vozella to purchase the locus from Carmer on Devine's behalf. By deed dated August 16, 1985, and recorded in the Nantucket registry of deeds, the locus was conveyed to Vozella. Carmer died approximately one month later. Other than the reference to that deed, Carmer's name does not appear in the grantor indices of the Nantucket registry of deeds between 1923 and 1985. The judge concluded that a reasonably diligent title examiner searching for the record title holder of the locus in 1985 would have ascertained that Carmer held good, clear, and marketable title to the locus. Based on the state of the title to the locus in 1985, a purchaser would have been able to obtain title insurance for the locus.

On October 13, 1988, Devine executed a declaration of trust entitled the "Loomis Realty Trust" and recorded it in the registry of deeds. Vozella then conveyed the locus to Devine as trustee by deed dated September 12, 1988, and recorded in the Nantucket registry of deeds. Devine had not visited the locus before it was conveyed to Vozella. After it was conveyed to the trust, he visited it on two occasions, once in 1990, and **[**11]** again in approximately 2000.

After the locus was conveyed to Vozella, the town restored it to the tax rolls. The town assessed property taxes to Vozella or the trust beginning in 1986. However, neither Vozella nor the trust paid the real estate taxes when they were due, resulting in the initiation of two tax takings by the town in 1991 and 1999. **[*505]** The trust then redeemed the tax takings by paying $ 45,097.60. [7] After the redemptions, the town continued to assess property taxes to the trust, which the trust paid through the first quarter of 2001. The trust also applied for and received an abatement of property taxes for fiscal year 2000. The trust has paid a net total of $ 46,549.10 in property taxes on the locus after acquiring it.

> 7 The trust's failure to pay the property taxes when due is consistent with Devine's business practice, which is to pay the property taxes when he resolves the heir's claim and sells the title interest that he has acquired.

On February 5, 1999, an attorney who was representing the trust wrote a letter to the board of health of Nantucket. Attached to that letter was a copy of a portion of a Nantucket assessor's map showing the locus labeled "TON." The judge inferred **[**12]** that "TON" stood for "Town of Nantucket." A copy of the same map, with an arrow containing the word "Subject" pointing to the locus, was apparently transmitted by facsimile to Devine in 1995. The locus was marked "TON" in that map as well. [8]

> 8 The judge rejected the town's contention that Devine acquired actual knowledge of the taking by receiving the map in 1995. Among other reasons, the judge credited Devine's testimony that

> he understood the "TON" notation to refer to a tax taking initiated in 1991. The town has not challenged these findings on appeal.

In October, 1998, the trust applied to the town for a permit to construct a septic system on the locus. That permit was issued in due course. On January 3, 2000, the trust applied to the town's building inspector for a building permit to construct a house on the locus. That permit was issued on June 2, 2000. Sometime in 2001, the trust commenced excavation on the locus, preliminary to construction of the house. At that time, the locus was outside the airport fence. The vast majority of the locus lies beyond the building restriction line that designates the buffer zone the town desires to keep on each side of the airport runways. The **[**13]** proposed location of the house was outside that buffer zone.

On June 12, 2001, town counsel sent a letter to the trust's lawyer, asserting that the locus was the subject of a 1968 taking by the town. Thereafter, the town filled in the excavation on the locus and revoked the trust's building permit. It also issued a stop work order and changed the location of the fence around the airport property so that it now includes the locus. The trust has been physically barred from the locus since June 12, 2001.

[*506] 2. *Discussion.* The town argues, first, that Devine's claim of title is barred by the three-year statute of limitations contained in *G. L. c. 79, § 16*. That limitation provision states:

> "A petition for the assessment of damages under section fourteen may be filed within three years after the right to such damages has vested; but any person, including every mortgagee of record, whose property has been taken or injured, and who has not received notice under section eight or otherwise of the proceedings whereby he is entitled to damages at least sixty days before the expiration of such three years, may file such petition within six months after the taking possession of his property or the receipt **[**14]** by him of actual notice of the taking, whichever first occurs, or, if his property has not been taken, within six months after he first suffers actual injury in his property."

Similarly, under *G. L. c. 79, § 18*, an action challenging the validity of a taking must be brought within three years from the time that the right to damages vests. *Cumberland Farms, Inc. v. Montague Economic Dev. & Indus. Corp., 38 Mass. App. Ct. 615, 616, 650 N.E.2d 811 (1995)*. Under *G. L. c. 79, § 3*, the right to bring an action for damages vests "[u]pon the recording of an order of taking . . . unless otherwise provided by law." The time limitations imposed by *G. L. c. 79* are inflexible and apply even to the claim that a taking was a nullity. *Whitehouse v. Sherborn, 11 Mass. App. Ct. 668, 674-675, 419 N.E.2d 293 (1981)*. The town argues that because the order of taking was recorded on October 3, 1968, the time to bring any action for damages or to challenge the validity of the taking expired on October 3, 1971. In the circumstances of this case, we disagree.

"The taking of land from a private owner against his will for a public use under eminent domain is an exercise of one of the highest powers of government." *Lajoie v. Lowell, 214 Mass. 8, 9, 100 N.E. 1070 (1913)* **[**15]** (taking void where railroad obtained determination of limits by county commissioners after taking rather than before as required by statute). Accordingly, we interpret the eminent domain statutes strictly in order to protect citizens from encroachment on their property rights. *Id.* In that regard, we pay particular regard to the recording of taking orders, for we have long held that the **[*507]** recording of the order of taking, which the taking authority is obligated to do under *G. L. c. 79, § 3*, and which starts the statute of limitations clock running, "is the vital act upon which depends the transfer of title from the landowner to the municipality. It is the operative alienation of the land. . . . It is the act which fixes the rights of the parties." *Radway v. Selectmen of Dennis, 266 Mass. 329, 334, 165 N.E. 410 (1929)*, citing *Turner v. Gardner, 216 Mass. 65, 69, 103 N.E. 54 (1913)*, and cases cited.

In the context of eminent domain, as in other contexts concerning real property, the recording of instruments serves vital purposes:

> "'First and foremost, [recording acts] are designed to protect purchasers who acquire interests in real property for a valuable consideration and without notice of prior interests from the **[**16]** enforcement of those claims.' . . . 'The second purpose of recording acts is fundamental to the achievement of the first. To make the system self-operative and to notify purchasers of existing claims, the recording acts create a public record from which prospective purchasers of interests in real property may ascertain the existence of prior claims that might affect their interests.'"

Selectmen of Hanson v. Lindsay, 444 Mass. 502, 507, 829 N.E.2d 1105 (2005), quoting 14 R. *Powell, Real Property § 82.01[3]*, at 82-13, 82-14 (M. Wolf ed. 2000).

General Laws c. 184, § 25, provides: "No instrument shall be deemed recorded in due course unless so recorded . . . as to be indexed in the grantor index under the name of the owner of record of the real estate affected at the time of the recording." The town argues that the recording provision of *G. L. c. 184, § 25*, is limited to instruments of "indefinite reference" and does not apply to taking orders under *G. L. c. 79, § 3*. We, however, agree with the judge in the Superior Court that the recording provisions of *§ 25* do apply to an order of taking. The "recorded in due course" provision of *G. L. c. 184, § 25*, by its plain terms, is not limited to instruments containing **[**17]** indefinite references. The Legislature could easily have written the statute to provide that "[n]o instrument *containing an indefinite reference* shall be deemed recorded in due course" (emphasis added); but it did not **[*508]** do so. We will not add to the statute language that the Legislature did not include. See *General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 803, 711 N.E.2d 589 (1999)*. Moreover, construing the "recorded in due course" provision to apply to all recorded instruments is consistent with the strong public policy, evident throughout the real property statutes, of providing a "self-operative" system for readily ascertaining title to land. See *Selectmen of Hanson v. Lindsay, supra*.

Here, it is indisputable that the 1968 order of taking was not indexed "under the name of the owners of record of the real estate affected at the time of the recording." *G. L. c. 184, § 25*. The owner of record at the time of the taking was Carmer. The judge found, on ample evidence, that Carmer could readily have been identified as the owner of the locus had the town taken reasonable steps to determine the record owner. There was no error in the judge's conclusion that, in the circumstances of this **[**18]** case, the order of taking was not recorded "in due course" and was thus invalid.

Our analysis is not swayed by the town's reliance on *G. L. c. 36, § 27*, which permits a registrar of deeds to enter the name of a grantor as "'unknown,' under the letter U" if the grantor's name does not appear in the instrument to be recorded. Nothing in the provision can be read to absolve the town of its responsibility to exercise reasonable diligence in attempting to identify the record owner of the locus before declaring the owner to be unknown. Nor is there any suggestion that the registrar of deeds for Nantucket County did anything improper by recording the 1968 order of taking as "owner unknown," given that the town presented the order to the registry in that condition. The sole evidence of the steps taken by the town in 1968 was the current commission chair's testimony that he thought the town would have done "whatever is necessary for the taking." The judge was warranted in finding that this general statement, apparently made without the benefit of personal knowledge, was outweighed by the evidence that the instruments duly recorded in the registry of deeds would have revealed the deed from McKeever **[**19]** (the subdivider) to Loomis, as well as the further deed from the Loomis sisters to Carmer. He was warranted in finding, based on uncontradicted testimony from an expert the judge found to be **[*509]** "highly qualified," that a reasonably prudent title examiner in 1968 would have discovered the deed to Carmer. We need not decide whether an "owners unknown" order of taking is sufficient to trigger the statute of limitations where the town or other taking authority made reasonable efforts to identify the owner, because here, the town's perfunctory efforts, if any, to identify the owner of the locus were inadequate under any standard.

This court's decision in *Hardy v. Jaeckle, 371 Mass. 573, 358 N.E.2d 769 (1976)*, on which the town relies, is unavailing. In that case, in assessing taxes, the board of assessors of Nantucket was required to exercise reasonable diligence to try to determine the identity of the owner from the records in the registry of deeds and registry of probate before assessing property to "persons unknown" or to a fictitious person, but was not required to look beyond those records. *Id. at 580*. Here, in contrast, there is no evidence that the town in fact examined its own registry of deeds or **[**20]** registry of probate before recording the order of taking as "owners unknown." More importantly, the judge's findings show that a reasonable examination would have revealed the existence of a deed to Carmer. The deed conveying the locus from McKeever, the subdivider, to Loomis was duly recorded, as was the deed from the Loomis sisters to Carmer. Although there was no deed or ancillary probate proceeding in Nantucket recording Loomis's devise of the locus to his sisters, see *G. L. c. 192, § 9*, we reject the town's suggestion that this presented an insurmountable gap. The judge found that there was but one deed in the grantor index from anyone named "Loomis," and that "it would have been very easy and prudent for a title examiner to check that conveyance to see if it referred to the [l]ocus." While the town argues that it was a mere fortuity that Loomis left the locus to family members who still had the same last name, we take the facts as presented in the record. The Nantucket registry of deeds contained one deed, easily located, from anyone named "Loomis." As Devine's expert credibly testified, "a **[**21]** conveyance by persons with the same surname as George Loomis . . . would have to be examined." He further testified that his standard practice would be to inquire as to any grantor with the same surname as the grantor he was searching, if practical, and that it was practical in this case. The judge's determination that the town reasonably **[*510]** could have found the deed to Carmer without the need to go beyond its own records is fully supported. [9] This

court's decision in *Hardy v. Jaeckle, supra*, cannot be stretched to absolve the town from venturing beyond tax rolls that it knew to be particularly unreliable in the area of Nantucket that held the locus.

> 9 The judge also suggested that a title examiner, noting that the deed to George L. Loomis recited that he was a resident of Somerset County, New Jersey, could have checked probate records in that county and discovered the will devising the locus to the Loomis sisters. The deed to Carmer recited that the locus had been left to the Loomis sisters in Loomis's will. In *Hardy v. Jaeckle, 371 Mass. 573, 578, 358 N.E.2d 769 (1976)*, this court did not require the town to go beyond its own records, due at least in part to statutory language, inapplicable here, that **[**22]** property taxes are to be assessed to "the person appearing of record, in the records of the county . . . where the estate lies, as owner." *Id.*, quoting *G. L. c. 59, § 11*, as appearing in St. 1939, c. 175. We need not decide whether the town would have been required, in the context of an eminent domain taking, to examine the New Jersey records.
>
> It is enough to resolve this case that a reasonable examination of Nantucket records would have revealed the existence of the deed to Carmer.

In view of the language of *G. L. c. 184, § 25*, the strictness with which we interpret the eminent domain statutes, and the important purposes served by the recording acts, we agree with the judge that the order of taking was not recorded in due course. As a result, the three-year limitations period for challenging the validity of a taking or filing a petition for damages did not start running as of the date of the "owner unknown" order of taking in 1968. Devine received actual notice of the town's claim to have taken the locus by letter dated June 12, 2001. He filed this action on August 28, 2001, less than three months later. By any standard, Devine commenced this action in a timely manner.

3. *Constitutional* **[**23]** *claims.* The town's actions, as the judge properly surmised, implicates constitutional concerns. Notice to the property owner is constitutionally required before property is taken by eminent domain. *Opinion of the Justices, 365 Mass. 681, 693, 313 N.E.2d 561 (1974)*, citing *Appleton v. Newton, 178 Mass. 276, 282, 59 N.E. 648 (1901)*. See *Schroeder v. City of N.Y., 371 U.S. 208, 211-212, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962)*; *Walker v. Hutchinson, 352 U.S. 112, 115, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956)*. Such notice need not in all cases be actual notice, so long as constructive notice is given. *Frost Coal Co. v. Boston, 259 Mass. 354, 357, 156 N.E. 676 (1927)*. But see *Schroeder v. City of N.Y., supra at 212-* **[*511]** *213*, citing *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* ("notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question"). Ordinarily, constructive notice can be effected by recording the order of taking in the registry of deeds. *Frost Coal Co. v. Boston, supra.* This presupposes, however, that the order of taking is recorded in such a way that it can be found "by **[**24]** means of a search conducted in the conventional method." *Dalessio v. Baggia, 57 Mass. App. Ct. 468, 473-474, 783 N.E.2d 890 (2003)*, quoting 4 American Law of Property § 17.17 (Casner ed. 1952). In *Mullane v. Central Hanover Bank & Trust Co., supra at 315*, the United States Supreme Court had stated, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." It is undisputed that, in 1968, no actual notice of the taking was provided to Carmer. The town argues that the recording of the "owners unknown" order of taking was sufficient to provide constructive notice. We disagree. As we have discussed, the town's failure to make a reasonably diligent effort to identify the record owner made its alleged expungement of Carmer's rights invisible to anyone conducting a reasonable title search.

The invisibility, as the judge found, was not limited to the registry of deeds. At the time of the taking, *G. L. c. 79, § 7D*, as amended through St. 1967, c. 476, required a town or other taking authority to pay damages to the Superior Court [10] to be invested on behalf of **[**25]** the person or persons entitled to them if, after reasonable investigation, the owner could not be determined. There is no evidence that the town paid any damages to the Superior Court. We need not decide in this case whether the failure to pay such damages, without more, invalidates a purported "owners unknown" taking. We agree with Devine, however, that *§ 7D*, at the time of the taking and now, has presumed that a reasonable investigation would be conducted *before* a town determined that the owner of taken property was **[*512]** unknown. As a matter of fundamental fairness, a town cannot take property, declare the owner to be unknown, and only then investigate whether there is anyone to whom damages can be paid.

> 10 *General Laws c. 79, § 7D*, as amended through St. 1975, c. 791, now requires a taking authority to pay the damages to the treasurer. See St. 1970, c. 795, § 1.

4. *Bona fide purchaser.* The town also challenges the judge's ruling that Devine was a bona fide purchaser

of the locus without notice of the taking. [11] The burden of proving that a person was *not* a bona fide purchaser lies with the party making that claim. *Selectmen of Hanson v. Lindsay, 444 Mass. 502, 509-510, 829 N.E.2d 1105 (2005)*, citing *Richardson v. Lee Realty Corp., 364 Mass. 632, 634, 307 N.E.2d 570 (1974)*. **[**26]** As our foregoing discussion makes clear, the town's argument that Devine was on notice by virtue of the 1968 order of taking must be rejected, as he could not have "obtain[ed] actual notice . . . by means of a search conducted in the conventional method." *Dalessio v. Baggia, supra at 473-474*, quoting 4 American Law of Property, *supra* (defendant bona fide purchaser without constructive notice where standard title examination practices would not have revealed out-of-chain conveyance). The town's reliance on cases involving Federal takings is misplaced, as the Federal takings statutes prescribe a wholly different process, namely an in rem condemnation proceeding commenced in the Federal District Court. [12], [13] See *United States v. 125.2 Acres of Land, 732 F.2d 239, 242-243 (1st Cir. 1984)* (under *40 U.S.C. § 258a*, **[*513]** title vests in United States prior to need to notify owners of right to compensation; inadequate notice does not render Federal taking void).

11 The town contests the judge's ruling that Devine's status as a bona fide purchaser without notice was sufficient to give him standing to challenge the taking. The town does not appear to dispute the general principle that a bona fide purchaser **[**27]** may have such standing; it merely suggests that Devine in fact had notice. Neither the judge nor the parties discuss cases such as *Barnes v. Springfield, 268 Mass. 497, 505-506, 168 N.E. 78 (1929)*, or *Howland v. Greenfield, 231 Mass. 147, 148, 120 N.E. 394 (1918)*, where it was held that subsequent purchasers lacked standing, at least where the owner at the time of the taking had actual or constructive notice. In the circumstances of this case, where Carmer lacked any notice of the taking, Devine's claim to be a bona fide purchaser without notice is sufficient to give him standing to bring this action to quiet title, even though doing so necessitates a challenge to the taking itself.

12 The town contends that a reasonably diligent title search would not disclose a Federal condemnation proceeding, for which notice is not required under Federal law. The argument is irrelevant to the town's actions at issue here. In any event, it appears that, although recording is not required under Federal statutes, the United States Attorney for Massachusetts has made it a practice to record Federal takings. See A.L. Eno & W.V. Hovey, Real Estate Law § 18.7, at 540 n.1 (4th ed. 2004).

13 We need not consider the town's suggestion, **[**28]** made for the first time in its reply brief and unsupported by authority, that an eminent domain taking is not a cloud on title that can be dispelled by a bona fide purchaser without notice. See, e.g., *Travenol Lab., Inc. v. Zotal, Ltd., 394 Mass. 95, 97, 474 N.E.2d 1070 (1985)*.

Finally, we will not ignore the town's own actions in rendering the taking unascertainable to reasonable title examination. The town purported to take the locus for purposes relating to the airport, but did not use it for any purpose until years later. There is no evidence that the town paid for the locus, or set money aside in the event that the owner would be found. The town did not take physical possession of the locus for over thirty years after the purported taking, and then only when Devine commenced building on the locus. In many respects, the town's behavior is inapposite to its claim to be the owner of the locus: it assessed taxes on the locus; it effected tax takings, which it allowed to be redeemed; it granted a tax abatement; and it issued the necessary permits for building on the locus. The town, apparently relying on nothing but its own inaccurate tax records, drew up an "owners unknown" order of taking, recorded **[**29]** it outside the existing chain of title, and then acted for the next thirty years as if no taking had occurred, until revoking Devine's permits, filling in his excavations, entering the locus, and fencing it in. There is considerable force in the policy favoring the finality of takings. But that policy is outweighed in this case by the necessity of giving adequate notice before effecting an eminent domain taking, and by the importance of maintaining a reliable land recording system. In the unusual circumstances of this case, the judge properly quieted title in Devine.

Judgment affirmed.

JOHN M. GIOVANELLA vs. CONSERVATION COMMISSION OF ASHLAND.

SJC-09678

SUPREME JUDICIAL COURT OF MASSACHUSETTS

447 Mass. 720; 857 N.E.2d 451; 2006 Mass. LEXIS 684; 64 ERC (BNA) 1367

September 5, 2006, Argued
November 28, 2006, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Giovanella v. Ashland Conservation Comm'n, 127 S. Ct. 1826, 167 L. Ed. 2d 321, 2007 U.S. LEXIS 3061 (U.S., Mar. 19, 2007)*

PRIOR HISTORY: **[***1]** Middlesex. Civil action commenced in the Superior Court Department on September 27, 2002. A motion for partial summary judgment was heard by S. Jane Haggerty, J.; a subsequent motion for summary judgment was heard by Bonnie H. MacLeod, J., and entry of final judgment was ordered by her. The Supreme Judicial Court granted an application for direct appellate review.
Giovanella v. Town of Ashland Conservation Comm'n, 2004 Mass. Super. LEXIS 630 (Mass. Super. Ct., Dec. 30, 2004)

DISPOSITION: Judgment affirmed.

COUNSEL: J. David Breemer, of California, for the plaintiff.

Joseph M. Hamilton for the defendant. Michael E. Malamut & Martin J. Newhouse, for New England Legal Foundation, amicus curiae, submitted a brief.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, & Cordy, JJ.

OPINION BY: SPINA

OPINION

[*721] **[**453]** SPINA, J. This appeal asks us to define the "relevant parcel" in a regulatory takings analysis. The plaintiff, John M. Giovanella, owned two contiguous lots in Ashland. One of the lots contained a house. Giovanella sought an order of conditions from the defendant, the conservation commission of Ashland (commission), that would allow him to build a house on the other lot. The commission denied his request because construction of the house would intrude into the twenty-five foot buffer zone around a wetland on **[***2]** the lot, in violation of a local bylaw. Giovanella filed suit in the Superior Court, seeking annulment of the commission's decision and, alternatively, damages for what he alleges on appeal was a regulatory taking under the *Fifth Amendment to the United States Constitution.* [1] On Giovanella's motion for summary judgment, the judge concluded that Giovanella failed to show that the decision of the commission was arbitrary or capricious. That portion of the judgment has not been appealed. The judge also ruled that the relevant parcel for purposes of the takings analysis was the entire parcel that Giovanella purchased, and not just the lot he sought to develop. The judge concluded that Giovanella had not shown sufficient economic harm as a result of the commission's decision, and had not shown a reasonable investment-backed expectation that he would be able to develop the lot in question. Based on these conclusions, a second judge granted the commission's subsequent motion for summary judgment. Giovanella appealed the ruling. We granted Giovanella's application for direct appellate review, and we now affirm. [2]

1 The plaintiff, John M. Giovanella, does not argue that the application of the bylaw resulted in a taking under *art. 10 of the Massachusetts Declaration of Rights.* We analyze his claim only under the *Fifth Amendment to the United States Constitution.*

[*3]**

2 We acknowledge the amicus curiae brief submitted by the New England Legal Foundation.

1. *Background.* On March 31, 1999, Giovanella purchased **[*722]** land in the town of Ashland (town) for $ 130,000. The property, which consisted of 34,589 square feet of land, had a small wetland in the northwest corner, and a single family residence on the southern portion. Between three and six months after buying the property, he learned that a previous owner had divided the property into two lots of nearly equal area. The lots were assessed separately for tax purposes, and had different addresses. The house was situated on lot 2, and the wetland on lot 1. When he learned the property had been divided he decided to build a new house on lot 1, into which he planned to move.

In December, 1999, nine months after Giovanella purchased the property, the town adopted a wetlands

protection bylaw. The bylaw prohibited all work or disturbance within twenty-five feet of any wetland area "unless the applicant provides information and evidence deemed satisfactory by the [c]ommission that the work to be performed sufficiently **[***4]** protects or enhances wetland interests." The wetland in the northwest corner of lot 1 was protected by this bylaw.

Sometime before March 21, 2000, Giovanella applied to the zoning board of appeals of Ashland (board) for a variance that would allow him to build a house on **[**454]** lot 1, an undersized lot. The board determined that the lot was grandfathered, and issued a special permit to build, subject to certain conditions, including a request that Giovanella obtain an order of conditions from the commission to ensure that all requirements of the wetlands protection bylaw would be satisfied. Giovanella does not appeal the special permit and its attendant conditions.

He proceeded to file with the commission a notice of intent to build a house on lot 1. The commission held hearings on April 9, 2001, to discuss the impact of construction on the wetlands buffer zone within lot 1. Robert Gemma, Giovanella's civil engineer, appeared at the hearing to discuss the plans he had prepared for construction of a house on the lot. Construction would encroach on the buffer zone temporarily, although it would not encroach on the wetland itself. The completed house would not encroach on the buffer zone. **[***5]** Gemma told the commission that he could not move construction any further from the buffer zone, and that to deny the plan he presented would deny use of the whole property. On April 23, 2001, in response **[*723]** to the commission's concerns with the plan, Gemma presented a second plan that incorporated mitigation measures designed to counteract any damage done to the wetlands during construction. On May 7, 2001, citing concerns with pollution and loss of wildlife habitat resulting from the disturbance during construction, the commission denied Giovanella's application for an order of conditions.

On June 19, 2002, more than one year after the commission had rejected his application for an order of conditions, Giovanella sold lot 2 for $ 319,900. While lot 2 was on the market, at least one person expressed interest in buying both lots 1 and 2 together. Nevertheless, Giovanella decided to sell lot 2 separately in the hopes of some day being able to build on lot 1. After the sale of lot 2 Giovanella hired an appraiser who concluded that by itself, lot 1 had no value. [3]

> 3 Giovanella's appraiser determined that lot 1 might have had some value to an abutter were it not for the tax liability that the town imposed. The tax liability was based on the town assessor's determination that lot 1 was developable. Of course, the town may not continue to tax lot 1 as developable land while simultaneously denying any opportunity to build on it. The appraiser concluded that should lot 1 be reassessed as an undevelopable lot, it would have a value of between $ 3,000 and $ 8,000 to an abutter.

[*6]** 2. *Ripeness.* It is necessary to begin with a discussion of ripeness. A regulatory takings case becomes ripe for adjudication only after two requirements are satisfied. First, an owner must allow the responsible government entity to reach "a final decision regarding the application of the regulation to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).* Second, an owner must exhaust available State remedies before seeking relief under Federal law. *Id. at 194.* We conclude that the commission did reach a final decision regarding Giovanella's land. During the proceedings in front of the commission, Gemma followed his initial plan with a revised plan that attempted to satisfy the commission's requirements. He also told the commission that the house could not be moved any further from the buffer zone. After the commission rejected Gemma's second plan, and after Gemma explained that the plans provided the only possible use of the property, the commission had an opportunity "to exercise [its] full discretion" as a land-use **[*724]** authority. See *Palazzolo v. Rhode Island, 533 U.S. 606, 620, 121 S. Ct. 2448,* **[**455]** *150 L. Ed. 2d 592 (2001).* **[***7]** It used that discretion to reject Giovanella's plan.

We also conclude that Giovanella has exhausted his available State remedies. He followed the commission's rejection with an appeal to the Department of Environmental Protection and he sent a letter to the chairman of the commission seeking reconsideration of the proposal. There were no other administrative remedies provided for in the wetlands protection bylaw or in the State wetlands protection act that authorized the bylaw. See *G. L. c. 131, § 40.* Some Federal courts have required litigants to pursue an "inverse condemnation" proceeding under State law before considering State remedies exhausted. See *Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87, 93 (1st Cir.)*, cert. denied, *540 U.S. 1090, 124 S. Ct. 962, 157 L. Ed. 2d 795 (2003)*; *Gilbert v. Cambridge, 932 F.2d 51, 65 (1st Cir.)*, cert. denied, *502 U.S. 866, 112 S. Ct. 192, 116 L. Ed. 2d 153 (1991).* In this case, an inverse condemnation claim would take the same form as the claim with which we are presented here. We see no reason to require Giovanella to make his claims first under the heading of "inverse condemnation" **[***8]** before considering the identical claim under the heading "regulatory taking."

3. *Regulatory takings law.* The *Fifth Amendment to the United States Constitution*, made applicable to the

States through the *Fourteenth Amendment*, provides that private property shall not "be taken for public use, without just compensation." This protection is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).*

Giovanella argues that the burdens placed on his land by the town's wetlands protection bylaw are so onerous as to require compensation under the *takings clause*. The United States Supreme Court has recognized this form of "regulatory takings" claim since its 1922 decision in *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)*, in which Justice Holmes laid out his "storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537, 161 L. Ed. 2d 876 (2005)*, **[***9]** quoting *Pennsylvania Coal Co. v. Mahon, supra at 415.*

[*725] Identifying when a regulation has gone "too far" is a fact sensitive inquiry. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 326, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)*; *Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 123-124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).* The Supreme Court has explained that there is no "set formula" for when compensation should be made, but that the determination rests on "the particular circumstances" in each case after "an essentially ad hoc, factual inquir[y]." See *Penn Cent. Transp. Co. v. City of N.Y., supra at 124.* In *Penn Cent. Transp. Co. v. City of N.Y., supra*, the Court provided three factors to guide this inquiry: the extent to which the regulation interferes with the owner's distinct investment-backed expectations; the economic impact of the regulation; and the character of the government action. These three factors have served as the principle guidelines for regulatory takings claims. *Lingle v. Chevron U.S.A. Inc., supra at 539.* **[***10]** They are designed to measure the "severity of the burden that government imposes upon private property rights." *Id. at 539.*

[456]** In *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)*, the Court established a limited exception to the use of the *Penn Central* factors in the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" (emphasis in original). A regulation that causes an owner to lose all economically beneficial use of a piece of property is a taking per se. *Id. at 1019.* The *Lucas* categorical rule is limited to those "relatively rare situations" in which the regulation causes an owner to "sacrifice *all* economically beneficial uses" (emphasis in original). *Id. at 1018, 1019.* The Court has said that the *Lucas* rule would not apply even if "the diminution in value were 95% instead of 100%." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra at 330.*

In order to measure the economic impact of a regulation under either the *Lucas* or *Penn Central* decisions, we **[***11]** must first define the unit of property on which that impact is to be measured. We then compare the value of that property before and after the alleged taking. The heart of both tests becomes defining the unit of property at issue, often called the "relevant parcel." When a court considers a large piece of land of which **[*726]** only a small portion has lost value due to regulation, it is less likely to conclude that a taking has occurred. If a court considers a smaller parcel of land, most of which has been affected by a regulation, then the economic impact is more likely to appear large enough to constitute a taking.

This has come to be known as the "denominator problem," and it has proved to be a hard problem to solve. The denominator problem has become an even more critical issue since the creation of the *Lucas* categorical rule. If a landowner is able to define the "relevant parcel" as only that part of land rendered valueless due to regulation, then the owner is automatically entitled to compensation for the value of that land. See *Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181-1182 (Fed. Cir. 1994)* (severing twelve and one-half affected acres from **[***12]** larger 250-acre parcel and finding categorical taking). At the same time, the benefits of an easily applied, bright-line rule are lost because the *Lucas* categorical rule "does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas v. South Carolina Coastal Council, supra at 1016 n.7.*

The Supreme Court has provided only minimal guidance for resolving the denominator problem. It has stressed that we are to use the "parcel as a whole" for a takings analysis. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra at 327*; *Penn Cent. Transp. Co. v. City of N.Y., supra at 130-131.* Repeated admonitions to use the "parcel as whole," however, do little to define the contours of that whole parcel in any particular case.

4. *Defining the denominator.* Definition of the relevant parcel, like the rest of the regulatory takings law, is a fact sensitive inquiry. See *Loveladies Harbor, Inc. v. United States, supra at 1181* ("Our precedent displays a flexible approach, designed to account for factual nuances"); *Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991)* **[***13]** (listing factors contributing to defining relevant parcel); *K & K Constr., Inc. v. Department of Natural Resources, 456 Mich. 570, 580, 575 N.W.2d 531,*

cert. denied, *525 U.S. 819, 119 S. Ct. 60, 142 L. Ed. 2d 47 (1998)* ("Determining the size of the denominator parcel is inherently a factual inquiry"). To determine the extent of the unit of property to be scrutinized **[**457]** under a regulatory takings **[*727]** analysis, courts look to those factors that "identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti v. United States, supra at 319.*

The intuitive starting point for determining the boundary of the property under a *takings clause* analysis is to consider as one unit all contiguous property held by the same owner at the time the taking occurred. See, e.g., *Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir.)*, cert. denied, *528 U.S. 951, 120 S. Ct. 373, 145 L. Ed. 2d 291 (1999)* (declining to sever contiguous parcels, one submerged and another above ground); *American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364, 372 (9th Cir. 1981)* (considering contiguous parcels one **[***14]** unit unless landowner met burden showing that development plans for each would be zoned differently); *Ciampitti v. United States, supra at 320* (combining noncontiguous property in relevant parcel where intervening linking lots also owned by same developer); *K & K Constr., Inc. v. Department of Natural Resources, supra at 581* ("contiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis"); *Bevan v. Brandon Township, 438 Mich. 385, 395-396, 475 N.W.2d 37*, amended *439 Mich. 1202 (1991)*, cert. denied, *502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 111 (1992)* (considering contiguous lots under common ownership "as a whole" for takings analysis); *Zealy v. Waukesha, 201 Wis. 2d 365, 380, 548 N.W.2d 528 (1995)* (declaring relevant parcel "clearly identified" as 10.4 contiguous acres owned by plaintiff). Following this logic, courts often begin by treating noncontiguous parcels or contiguous parcels with separate owners as separate units. See, e.g., *Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass. 754, 762-763, 831 N.E.2d 865 (2005)* (beginning analysis with individual lot before suggesting **[***15]** inclusion of noncontiguous property); *Lopes v. Peabody, 417 Mass. 299, 300-301, 629 N.E.2d 1312 (1994)* (considering one lot in takings analysis but not noncontiguous parcels purchased at same time); *Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1381*, aff'd on rehearing, *231 F.3d 1354 (Fed. Cir. 2000)* (severing fifty acres from larger 261-acre parcel across road in part because property was physically remote); *Coeur D'Alene v. Simpson, 142 Idaho 839, 136 P.3d 310, 320 (Idaho 2006)* (severing two parcels separated by road and separately owned).

[*728] Courts have considered a wide array of other factors beyond contiguous commonly-owned parcels, including: whether the property is divided by a road, see *Palm Beach Isles Assocs. v. United States, supra at 1381* (describing property on either side of road as physically remote); *Coeur D'Alene v. Simpson, supra at 323* (finding presence of road not determinative, but "one factor to consider"); whether property was acquired at the same time, see *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681, 689, 673 N.E.2d 61 (1996)* **[***16]** (treating as one unit all lots purchased within same subdivision on same date); *Ciampitti v. United States, supra at 318-319* (finding noncontiguous property acquired on same date to be one parcel); whether the purchase and financing of parcels were linked, see *Forest Props., Inc. v. United States, supra at 1365* (treating two parcels as one unit in part because option to purchase lake-bottom land could be exercised only by owner of adjacent uplands); *Ciampitti v. United States, supra at 319, 320* (treating two noncontiguous parcels as one in part because "inextricably linked in terms of purchase and financing"); the timing of development, see **[**458]** *Palm Beach Isles Assocs. v. United States, supra at 1381* (severing contiguous property where development was temporally remote from larger parcel); *Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994)* (excluding contiguous land developed and sold before enactment of regulation); whether the land is put to the same use or different uses, see *id. at 1181-1182* (severing conservation land from land **[***17]** intended for residential development); whether the owner intended to or actually did use the property as one economic unit, see *Norman v. United States, 429 F.3d 1081, 1091 (Fed. Cir. 2005)* (including property because "appellants themselves regarded the 2,280-acre parcel as a single economic unit"); *Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1346 (Fed. Cir. 2004)*, cert. denied, *543 U.S. 1188, 125 S. Ct. 1406, 161 L. Ed. 2d 191 (2005)* (combining contiguous leases even though purchased at different times when part of "one unified mining plan"); *Forest Props., Inc. v. United States, supra at 1365* (considering two parcels as one unit when treated as "single integrated project . . . comprising the two tracts"); *K & K Constr., Inc. v. Department of Natural Resources, 456 Mich. 570, 582, 575 N.W.2d 531*, cert. denied, **[*729]** *525 U.S. 819, 119 S. Ct. 60, 142 L. Ed. 2d 47 (1998)* (combining parcels in part because owners "forged a connection between parcels . . . through the proposed development scheme and permit applications"); and the treatment of the property under State law, see *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)* **[***18]** (proposing solution to denominator problem according to "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land"); *Coeur D'Alene v. Simpson, supra at 323* (considering separated or unified tax treatment by town when severing).

We conclude that the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel. Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property. In addition to identifying the unit of property "as realistically and fairly as possible," *Ciampitti v. United States, 22 Cl. Ct. 310, 319 (1991)*, contiguity is also the most easily measured of the many factors courts have used for this inquiry.

Even so, definition of the relevant parcel is a fact sensitive inquiry, and we do not propose a bright-line rule here. This presumption in favor of contiguity may be overcome to either increase or decrease the size of the parcel by the application of additional factors, including those described above. For example, a relevant parcel might be increased to include noncontiguous **[***19]** land used for a single unified economic purpose, as in the case of one business that uses several noncontiguous buildings scattered throughout a city block. See *Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass. 754, 762-763, 831 N.E.2d 865 & n.15 (2005)* (suggesting inclusion in relevant parcel of all property previously owned by one family and used as seaside resort). Similarly, a parcel might be severed from contiguous land where an owner proposes truly different uses for separate portions, or shows that the property is treated as separate, distinct economic units. See *Loveladies Harbor, Inc. v. United States, supra at 1181* (severing land intended for residential development from conservation land promised to State).

An owner's treatment of property as a distinct economic unit is the most significant factor to consider in overcoming the presumption in favor of contiguous **[**459]** property. Occasionally, **[*730]** evidence of use as an economic unit involves ongoing established uses. More often, though, courts are presented with an owner's assertion that the intended use was to divide property into separate economic units. Concern that the introduction of such subjective **[***20]** factors would "increase the difficulty of an already complex inquiry" has led at least one jurisdiction to reject the use of any factor that relies on the owner's intended use rather than the owner's actual use. See *Zealy v. Waukesha, 201 Wis. 2d 365, 377-378, 548 N.W.2d 528 (1995)*. Nevertheless, we consider an owner's intended use to be an important factor when deciding whether property should be protected as a distinct unit under the *takings clause*. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1232 (1967) (proposing denominator defined by property "identified by the owner" as unit).

Treatment of the property under State or local law is a relevant factor, but one with limited weight. Our reliance on contiguous property minimizes the significance of lot lines in defining the boundaries of the denominator. Separate addresses or tax treatment as separate lots similarly carries little weight. Treatment under State law may play a larger role in cases of "conceptual severance," where individual uses of land are identified and protected under State law, and an owner attempts to recover **[***21]** compensation for the loss of the use based on that protection. [4] See *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)* (noting that background principles of State nuisance law permit States to proscribe particular uses without compensation); *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414, 43 S. Ct. 158, 67 L. Ed. 322 (1922)* (severing interest in coal in part because recognized as separate estate under State law). But see *Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)* (declining to sever interest in coal based merely on **[*731]** "legalistic distinction[]" of State recognition of "support estate"); *Seiber v. United States, 364 F.3d 1356, 1369 (Fed. Cir)*, cert. denied, *543 U.S. 873, 125 S. Ct. 113, 160 L. Ed. 2d 122 (2004)* (declining to use State law to define relevant parcel of timberland when owners argued State law protects property interest in individual trees). We are not here faced with such an argument, so we do not consider the treatment of Giovanella's property under State law to be of particular significance.

> 4 To allow separate regulatory treatment under State law to sever contiguous property would isolate only the regulated property in nearly all instances, thus practically ensuring compensation for every regulatory imposition. The United States Supreme Court has rejected that approach, noting that "defining the property interest taken in terms of the very regulation being challenged is circular." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)*.

[*22]** While few courts explicitly employ this presumption in favor of contiguous commonly-owned property, we believe that the analysis used by many courts follows this pattern. Instead of a continued attempt at balancing undifferentiated factors, or a bright-line rule, we consider it a fair and practical approach to emphasize the importance of contiguous commonly-owned property.

5. *Giovanella's claim.* (a) *The denominator.* A judge in the Superior Court denied Giovanella's motion for summary judgment and concluded that the commission's denial was not a taking. Summary judgment was later granted in favor of the **[**460]** commission based on the earlier decision denying Giovanella's motion. In that

opinion, the judge used a relevant parcel that included both lot 1 and lot 2, and considered Giovanella's claims under both the multifactor *Penn Central* analysis, see *Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 123-124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)*, and the *Lucas* categorical rule, see *Lucas v. South Carolina Coastal Council, supra at 1017*. With respect to the *Lucas* categorical rule, the judge concluded that Giovanella had not lost all economically **[***23]** beneficial use of his land because he had sold lot 2 for a profit. Under the *Penn Central* analysis, the judge concluded that any adverse economic impact on lot 1 was in part the result of Giovanella's poor business decision to sell lots 1 and 2 separately.

When reviewing the grant of summary judgment to the commission we ask whether, when viewed in the light most favorable to Giovanella, the evidence presented would permit a finding that a taking has occurred. If not, the commission is entitled to a judgment as a matter of law. See *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*, citing *Mass. R. Civ. P. 56 (c)*, 365 Mass. 824 (1974).

[*732] We begin our denominator inquiry with the presumption that Giovanella's two contiguous lots are one unit of property for purposes of the takings analysis. We next look to additional factors to determine whether there is sufficient evidence to overcome this presumption. These factors are designed to identify the property on which the impact of the regulation is to be measured. Giovanella does not make a facial challenge to the bylaw, but he challenges it as it was applied **[***24]** to his land. These factors should therefore be examined with respect to the time of the bylaw's impact, when the commission rejected his request for an order of conditions.

Giovanella argues that we should sever lot 1 from lot 2 because lot 1 has economically viable uses, and because he had no common development scheme connecting the two. The economic viability of land does not define its boundaries for purposes of the *takings clause*. Neither are two contiguous units of property severed merely because of the absence of a common development scheme. In order to overcome the presumption that lots 1 and 2 should be treated together as one unit, Giovanella must present some affirmative evidence of his separate treatment of the two lots.

In considering each of the factors in turn, we conclude that Giovanella has presented insufficient evidence to sever the two parcels. They were purchased at the same time, for a lump sum, as part of one transaction. There is no evidence that they were separately financed. The separate addresses, tax treatment, and lot lines are of minimal significance, and by themselves do not provide enough evidence of his separate treatment of the contiguous lots. They **[***25]** are not separated by a road. Both lots are intended for single family residential use. Finally, and most importantly, he has not shown that he planned to or actually did treat them as separate economic units. Property intended for residential development by a single owner has been considered as one economic unit, and we see no reason to depart from that treatment here. See *Zanghi v. Board of Appeals of Bedford, 61 Mass. App. Ct. 82, 85-86, 807 N.E.2d 221 (2004)*; *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681, 689, 673 N.E.2d 61 (1996)*.

There may be circumstances in which neighboring lots should **[*733]** be considered separately under the *takings clause*, as **[**461]** when an owner can show separate business plans or financing for the two lots, or when they are developed for substantially different uses. In this case, Giovanella has provided no evidence showing that he treated his lots as two distinct economic units. He has only pointed to the absence of evidence showing that he treated them as one unit. It is not the commission's burden to show that the lots were treated as one unit under a "common development scheme." Rather, it is Giovanella's burden **[***26]** to show that he intended to, or actually did, treat them separately. Because he failed to produce evidence sufficient to show that they should be severed, we treat the two lots as one.

(b) *Multifactor* Penn Central *analysis*. It is clear, and Giovanella does not contest, that considering lots 1 and 2 together forecloses any compensation under *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)*. He was able to sell lot 2 for $ 319,900, an amount which is clearly more than a "token interest." See *Palazzolo v. Rhode Island, 533 U.S. 606, 631, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)*. Because the land was not rendered economically valueless, there can be no categorical taking. We proceed to his second argument that, even if the relevant parcel includes lots 1 and 2, the judge erred in the application of the *Penn Central* factors. We consider each of the three factors in turn.

The judge concluded that the bylaw did not interfere with Giovanella's reasonable investment-backed expectations because he could have had no expectation of building on an undersized lot. This was error. The town's zoning laws did limit new home construction **[***27]** to 30,000 square foot lots, but Giovanella's neighborhood was made up primarily of lots no bigger than lot 1 (17,490 square feet). A person in Giovanella's situation may well have relied on his ability to build on lot 1 based on its similarity to the surrounding lots on which homes had already been built, or based on the availability of special permits for preexisting nonconforming lots.

Nevertheless, the wetlands protection bylaw did not impermissibly interfere with Giovanella's reasonable

investment-backed expectations. The only financial investment he made in the property was the $ 130,000 he paid for both lots. This amount was more than recovered when he sold lot 2, after the order of **[*734]** conditions was denied, for $ 319,900. Although the judge erred in holding that Giovanella *could not* have relied on his ability to build on an undersized lot, it appears that he *did not* rely on his ability to build on lot 1 because he did not invest any money that relied on the separate development of lot 1. A takings claim is not defeated "simply on account of [an owner's] lack of a personal financial investment." *Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass. 754, 766, 831 N.E.2d 865 (2005)* **[***28]** (finding no interference with reasonable investment-backed expectations where owner's lack of investment in inherited property implied no reasonable expectation of ability to develop). But Giovanella's failure to show any substantial personal financial investment in the development of lot 1 "emphasizes [his] inability to demonstrate that [he] ever had any *reasonable* expectation" of building a house on that lot (emphasis in original). See *Gove v. Zoning Bd. of Appeals of Chatham, supra.*

When lots 1 and 2 are treated as one parcel, it becomes clear that the economic impact of the wetlands protection bylaw did not rise to the level of a taking. To evaluate the economic impact of the bylaw, we compare the value of Giovanella's land before and after the application for an order of conditions was denied. Before **[**462]** the denial the town assessed lot 1 as a developable lot worth $ 132,800. Giovanella has presented no evidence of the separate value of lot 2 before the denial. However, even assuming that the sale of lot 2 in 2002 for $ 319,900 accurately reflects the value of that lot in 1999, and the combined predenial value of the lots was $ 452,700, the action of **[***29]** the commission did not constitute a taking. With the value of lot 1 reduced to zero after the denial, the value of the entire property was reduced to $ 319,900. The economic impact of the action of the commission resulted in a decrease in the value of Giovanella's property from $ 452,700 to $ 319,900, a decrease of twenty-nine per cent. This decrease is not significant enough to rise to the level of a taking. See *Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004)*, cert. denied, *543 U.S. 1188, 125 S. Ct. 1406, 161 L. Ed. 2d 191 (2005)* (finding no taking after decreases in value of seventy-eight per cent and ninety-two per cent on two combined lots); *Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1178 (Fed. Cir. 1994)* (finding categorical taking after ninety-nine per cent **[*735]** diminution in value, from $ 2,658,000 to $ 12,500); *Ciampitti v. United States, 22 Cl. Ct. 310, 320 & n.5 (1991)* (finding no taking after decrease in value of twenty-six per cent, from $ 19 million to $ 14 million).

Finally, the character of the government action does not support the conclusion that application of the bylaw was a taking. **[***30]** The most straightforward analysis, and the one the judge applied, is whether the character of the government action is like a physical invasion. See *Leonard v. Brimfield, 423 Mass. 152, 156, 666 N.E.2d 1300*, cert. denied, *519 U.S. 1028, 117 S. Ct. 582, 136 L. Ed. 2d 513 (1996)*; *Zanghi v. Board of Appeals of Bedford, 61 Mass. App. Ct. 82, 90, 807 N.E.2d 221 (2004)*; *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681, 695, 673 N.E.2d 61 (1996)*. The Supreme Court also has considered whether a regulation unfairly singles out the owner. See *Eastern Enters. v. Apfel, 524 U.S. 498, 537, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998)*. Other courts have looked at whether the government regulation is limited to mitigating harms or nuisances. Such regulations typically do not require compensation. *Gove v. Zoning Bd. of Appeals of Chatham, supra at 767* (noting that regulations that mitigate harm do not typically require compensation); *Appolo Fuels, Inc. v. United States, supra at 1351* (finding no taking where government action was "designed to protect health and safety"). Of course, many government actions that **[***31]** do extend beyond nuisance or harm prevention do not result in a taking. The character of government action is less likely to result in a taking when it is limited to nuisance prevention, but this factor provides no guidance for analyzing regulations that extend beyond nuisance prevention. See *Forest Props., Inc. v. United States, 177 F.3d 1360, 1366 (Fed. Cir.)*, cert. denied, *528 U.S. 951, 120 S. Ct. 373, 145 L. Ed. 2d 291 (1999)* (finding character of government action had no impact where action was not limited to preventing nuisance).

No matter how the character of the commission's action is analyzed, application of the bylaw to Giovanella's land was not a taking. The limitations imposed by the town's wetlands protection bylaw are not like a physical invasion, nor does the bylaw unfairly single out Giovanella. Even if the bylaw extends beyond preventing harms or nuisance, the character of the commission's denial would have no impact on the case. Giovanella has failed to demonstrate any reasonable reliance on his ability **[*736]** to build a home on lot 1, or to show sufficient economic losses resulting from the denial of his application. As a **[**463]** result, neither justice nor fairness entitle him **[***32]** to compensation for the impositions of the bylaw.

Judgment affirmed.

CHARLES LOWNEY & another [1] vs. COMMISSIONER OF REVENUE.

1 Irene Lowney.

No. 05-P-1353

APPEALS COURT OF MASSACHUSETTS

67 Mass. App. Ct. 718*; *856 N.E.2d 879*; *2006 Mass. App. LEXIS 1152

September 13, 2006, Argued
November 9, 2006, Decided

SUBSEQUENT HISTORY: As modified November 27, 2006.

PRIOR HISTORY: **[***1]** Suffolk. Appeal from a decision of the Appellate Tax Board.

COUNSEL: Timothy J. Lowney for the plaintiffs.

Maryanne Reynold Martin, Assistant Attorney General, for Commissioner of Revenue.

JUDGES: Present: Rapoza, C.J., Gelinas & Grainger, JJ.

OPINION BY: GRAINGER

OPINION

[*718] **[**880]** GRAINGER, J. At issue in this case of first impression is the application of the room occupancy excise (tax), *G. L. c. 64G*, to the first ninety days of rentals that exceeded a ninety-day period. Plaintiffs, Charles and Irene Lowney, own and operate the Carleton Circle Motel (motel) in Falmouth. They appeal the decision of the Appellate Tax Board affirming the denial of their application for tax abatement by the Commissioner of Revenue.

Background. The Lowneys purchased the motel in 1986. The motel has thirty-eight units, seventeen of which have kitchenettes rendering them amenable to longer term housekeeping rentals. Clientele comprise both short-term, mostly summertime, guests and long-term guests, who live at the motel for many **[*719]** months, receive mail addressed to them there, and generally use it as their residence. The Lowneys used a different form of rental agreement for those guests who indicated they would be staying for **[***2]** longer periods. In contrast to short-term guests, long-term guests were required to provide security deposits and references, but enjoyed lower rates.

The length of time that guests remain at the motel is rendered relevant to the tax by the definition of "occupancy" in *c. 64G. Section 3* of the statute imposes a tax on "the transfer of occupancy" of a room in a motel. [2] The definition of "occupancy" appears in *§ 1(g)* and, in pertinent part, is described as possession or the right to possession of premises "for a period of ninety consecutive calendar days or less." [3]

2 *General Laws c. 64G, § 3*, as amended by St. 1988, c. 31, § 3, provides in relevant part:

> "An excise is hereby imposed upon the transfer of occupancy of any room or rooms in a bed and breakfast establishment, hotel, lodging house, or motel in this commonwealth by any operator. . . ."

3 *General Laws c. 64G, § 1(g)*, as amended through St. 1989, c. 341, § 55, defines "occupancy" as:

> "[T]he use or possession, or the right to the use or possession, of any room or rooms in a bed and breakfast establishment, hotel, lodging house or motel designed and normally used for sleeping and living purposes, or the right to the use or possession of the furnishings or the services and accommodations, including breakfast in a bed and breakfast establishment, accompanying the use and possession of such room or rooms, for a period of ninety consecutive calendar days or less, re-

> gardless of whether such use and possession is as a lessee, tenant, guest or licensee."

[*3]** From 1986 until 1993, the Lowneys collected the tax from each guest for the entire rental period or for ninety days, whichever was less. In 1993, they changed their practice to collect the tax **[**881]** only from guests who stayed for ninety days or fewer. [4]

> 4 The reason for the change in practice plays no part in our decision. Charles Lowney testified that he was informed by unidentified District Court officials that guests who stayed for longer than ninety days were classified as "residents" (rather than occupants) and therefore not subject to his attempt to file criminal complaints for unpaid rent or bad checks. Accordingly, he concluded that the tax did not apply to these individuals.

Proceedings below. After an audit conducted in 1999, the **[*720]** Department of Revenue (department) assessed the Lowneys for the tax that they had not collected for the first ninety days from individuals who stayed longer than ninety days during the period of September, 1996, through March, 1999. The Lowneys filed an application for abatement, **[***4]** which the department denied. The Appellate Tax Board (board) affirmed the denial. The board based its decision on two independent findings: first, the Lowneys had failed to prove that any renters had stayed longer than ninety days, and second, the statutory scheme, as interpreted in regulations issued by the Commissioner of Revenue (commissioner), required collection of the tax for the first ninety days of every rental regardless of the total length of the stay.

Discussion. We will not overturn a finding of the board unless it is "not supported by substantial evidence or is based on an error of law." *M & T Charters, Inc. v. Commissioner of Rev., 404 Mass. 137, 140, 533 N.E.2d 1359 (1989).* We review the sufficiency of the evidence to determine "whether a contrary conclusion is not merely a possible but a necessary inference from the findings." *Kennametal, Inc. v. Commissioner of Rev., 426 Mass. 39, 43, 686 N.E.2d 436 (1997)*, cert. denied, *523 U.S. 1059, 118 S. Ct. 1386, 140 L. Ed. 2d 646 (1998)*, quoting from *Commissioner of Rev. v. Houghton Mifflin Co., 423 Mass. 42, 43, 666 N.E.2d 491 (1996).* We address initially the board's finding that the Lowneys "did not . . . offer into evidence any **[***5]** long-term agreements for periods in excess of ninety consecutive days" nor did they offer proof of renters who actually stayed for periods in excess of ninety consecutive days. If this finding were supported, we would not reach the issue of tax liability incurred for the first ninety days of longer stays. However, the record contains numerous uncontradicted examples of renters who stayed in excess of ninety days, including those listed on the very audit sheets, entitled "Non-Taxed Rooms," issued by the department. [5] Additionally, Charles Lowney testified that some **[*721]** tenants stayed for several years. [6] Accordingly, the board's finding that there was no evidence of tenants who exceeded ninety days is in error, and cannot provide a proper basis to dispose of this matter. We turn therefore to the meaning of c. 64G, and the circumstances that trigger the tax under that statue.

> 5 As examples, the audit sheets show the following periods of rental:
>
> Morgan, September 9, 1996 to April 2, 1997 (203 days);
>
> Cardoza, September 5, 1996 to May 4, 1997 (241 days);
>
> Connolly, September 6, 1996 to May 16, 1998 (617 days);
>
> Kempton, September 14, 1996 to February 21, 1998 (525 days);
>
> Greg, April 6, 1996 to December 27, 1996 (265 days); and
>
> Guess, June 3, 1996 to October 26, 1996 (145 days).

[*6]**

> 6 Although the audit sheets in the record span only 1996 to 1998, Charles Lowney's testimony is supported by inclusion in the audit sheets of two tenants, Connolly and Kempton, each of whose residencies lasted more than one year.

[882]** As stated above, the parties' dispute centers on their interpretation of the phrase in *§ 1(g)* defining occupancy as "a period of ninety consecutive calendar days or less." The Lowneys argue that possession for ninety-one consecutive days or longer falls outside the statutory definition of occupancy, and under such circumstances no taxable event has occurred. The department claims, to the contrary, that the statute does not preclude the qualification of a period of ninety consecutive days as "occupancy" even if that period is part of a longer stay. We conclude that the phrase "a period of ninety consecutive calendar days or less" comprehends a clear beginning and a clear end, the latter of which occurs before or on the ninetieth day. The department's

interpretation, which is that the statutory "period" is equally capable of being perceived to exist within a longer **[***7]** number of consecutive days (in effect, any period longer than the length set by the statute), is, at best, strained. While a straightforward reading of the statute is a sufficient basis to reverse the decision below, we recognize that the interpretation of an agency charged with the administration and implementation of a statutory scheme is entitled to consideration. We therefore turn to principles of statutory interpretation.

The first point of inquiry, legislative history, provides no guidance. We are not aware of any legislative history bearing on this issue, and the parties have not cited any. It is well settled, however, that taxing statutes are to be construed strictly against the taxing authority. "The right to tax must be plainly conferred by the statute. It is not to be implied." *McCarthy v. Commissioner* **[*722]** *of Rev., 391 Mass. 630, 632-633, 462 N.E.2d 1357 (1984)*, quoting from *Cabot v. Commissioner of Corps. & Taxn., 267 Mass. 338, 340, 166 N.E. 852 (1929)*. Furthermore, "all doubts [are to be] resolved in favor of the taxpayer." *Commissioner of Rev. v. AMI-Woodbroke, Inc., 418 Mass 92, 94, 634 N.E.2d 114 (1994)*, quoting from *Dennis v. Commissioner of Corps. & Taxn., 340 Mass. 629, 631, 165 N.E.2d 893 (1960)*. **[***8]** See *Commissioner of Rev. v. Oliver, 436 Mass. 467, 473, 765 N.E.2d 742 (2002)* (relying on "the settled principles that the authority to tax must be plainly conferred and that any ambiguity must be resolved in favor of the taxpayer").

At the same time, as noted above, we recognize and reaffirm the important principle that the interpretation of the commissioner, as the individual charged with administration of the statute and collection of tax revenues thereunder, is customarily entitled to great weight. See *Massachusetts Elec. Co. v. Massachusetts Commn. Against Discrimination, 375 Mass. 160, 169-170, 375 N.E.2d 1192 (1978)*. The commissioner's interpretation in this instance, however, relates to more than implementation or administration of the statutory scheme. It is a determination of the underlying basis of taxability created by the Legislature, and we conclude that the commissioner's interpretation imputes added terms to *c. 64G*'s plain language defining the activity that triggers a tax. [7] In such a case, where a term in a statute is allegedly ambiguous, courts have found that an agency's interpretation of a statute is, at best, entitled to "some deference," *Macy's East, Inc. v. Commissioner of Rev., 441 Mass. 797, 806,* **[**883]** *808 N.E.2d 1244,* **[***9]** cert. denied, *543 U.S. 957, 125 S. Ct. 454, 160 L. Ed. 2d 319 (2004)*, albeit not "the 'great weight' given to a duly promulgated administrative regulation which lends specificity to a broad statutory scheme." *Xtra, Inc. v. Commissioner of Rev., 380 Mass. 277, 282, 402 N.E.2d 1324 (1979)*, citing *Massachusetts Elec. Co. v. Massachusetts Commn. Against Discrimination, supra*. Alternatively phrased, where the commissioner has spoken to a particular issue, as was done here **[*723]** in both a regulation and a technical information release, [8] courts have found that the regulatory position is "entitled to *some deference* because the Legislature has delegated to the commissioner the responsibility of administering, interpreting, and enforcing the State tax laws, and resolving statutory ambiguity" (emphasis added). *Macy's East, Inc. v. Commissioner of Rev., supra.* In other cases, where the statute has been found to be unambiguous, courts have declined to accord any deference whatsoever to the department's regulation, reasoning that "a regulation that purports to tax an item that the statute itself does not tax **[***10]** is itself invalid." *Commissioner of Rev. v. Oliver, 436 Mass. at 474*, citing *Lowell Sun Publishing Co. v. Commissioner of Rev., 397 Mass. 650, 652, 493 N.E.2d 192 (1986)* (regulations concluded to be invalid where they imposed taxes "beyond the authorization of the statute"). See *Atlanticare Med. Center v. Commissioner of Div. Of Med. Assistance, 439 Mass 1, 6, 785 N.E.2d 346 (2003)*, quoting from *Massachusetts Hosp. Assn. v. Department of Med. Security, 412 Mass. 340, 346, 588 N.E.2d 679 (1992)* ("an 'incorrect interpretation of a statute . . . is not entitled to deference'").

> 7 In effect, the commissioner's determination in this case, upheld by the board, adds the phrase "whether or not such period is part of a longer period of consecutive use or possession" (or equivalent language) to *§ 1(g) of c. 64G*. "A court may not add words to a statute that the Legislature did not put there." *Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Ct. Dept., 439 Mass. 352, 355, 787 N.E.2d 1032 (2003)*.
>
> 8 "For the first ninety consecutive days, the transfer of occupancy of the rooms [in an illustrative example] is subject to the room occupancy excise. Occupancy after the first ninety consecutive days is not subject to the excise." *830 Code Mass. Regs. § 64G.1.1* (1993). "The operator [in an illustrative example] is required to collect the excise on the rental charges ... for the first ninety consecutive days. No excise is imposed on the rent for the continuing occupancy of these rooms after the ninetieth day." Technical Information Release 79-5 (July 9, 1979).

[*11]** We note additionally that the commissioner's own public pronouncements on the issue have been inconsistent. In contrast to the commissioner's recitation of illustrative fact patterns contained in *830 Code Mass. Regs. § 64G.1.1* (1993), the department's Guide to

Massachusetts Tax and Employer Obligations (Guide), [9] in a discussion about room occupancy tax, states that "[t]he total tax rate is applied only to the rent received from an individual who occupies the lodgings for ninety consecutive days or less." In contrast to the other interpretations, which speak of taxing the "first ninety consecutive days" **[*724]** of occupancies that continue beyond that length, the Guide restricts imposition of the tax "only" to rent paid by individuals who leave before the ninety-first day. While the Guide does not rise to the level of a department regulation, it nevertheless reflects the weakness of the contrary position asserted by the commissioner in the face of the language of the statute. [10]

9 Available only at http://www.dor.state.ma.us/business/taxguide/room.htm (last visited November 8, 2006). At oral argument, this court invited both parties to submit supplemental written arguments addressing the Guide, and the commissioner availed himself of that opportunity.

[*12]**

10 See *Massachusetts Elec. Co. v. Massachusetts Commn. Against Discrimination, 375 Mass. at 170 n.5*, where the Supreme Judicial Court noted the absence of inconsistent interpretations in upholding an agency's decision, and contrasted the United States Supreme Court's rejection of an administrative agency's ruling in *General Elec. Co. v. Gilbert, 429 U.S. 125, 142-143, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976)*, where the agency's interpretation was not entitled to deference because, among other reasons, it contradicted an earlier position taken by the same agency.

[884]** Finally, the commissioner argues that the Lowneys, as taxpayers, have the burden of proving entitlement to an abatement of the tax. See *Towle v. Commissioner of Rev., 397 Mass. 599, 603, 492 N.E.2d 739 (1986)*. A taxpayer's burden to prove entitlement to an abatement normally arises where the existence of the tax itself is not in dispute, but rather the valuation of property or the categorization of certain activity is at issue. [11] See *Boston v. Second Realty Corp., 9 Mass. App. Ct. 282, 284, 400 N.E.2d 876 (1980)* **[***13]** (abatement is proper avenue for relief, rather than declaratory judgment or injunction, where amount of tax and not existence of tax is in dispute). Here, the Lowneys have demonstrated that the tax was not properly assessed under the language of *G. L. c. 64G*, and therefore they are entitled to an abatement. See *Dennis v. Commissioner of Corps. & Taxn., 340 Mass. at 631-632*.

11 See, e.g., *Boston Professional Hockey Assn. v. Commissioner Of Rev., 443 Mass 276, 283-288, 820 N.E.2d 792 (2005)* (abatement denied because out-of-State revenues closely related to in-State business); *Macy's East, Inc. v. Commissioner of Rev., supra at 803-804* (abatement denied where taxpayer claimed deduction after acquiring subsidiaries that had previously overpaid taxes); *Morton Buildings, Inc. v. Commissioner of Rev., 43 Mass. App. Ct. 441, 444-446, 683 N.E.2d 720 (1997)* (abatement allowed where taxpayer successfully claimed raw materials had been converted into building components before entering the Commonwealth); *NYNEX Corp. v. Commissioner of Rev., 61 Mass. App. Ct. 575, 577-581, 812 N.E.2d 1230 (2004)* (abatement denied for holding company that claimed losses of subsidiaries).

[*14]** *Conclusion.* *General Laws c. 64G*, by its terms, does not impose a room occupancy excise on rent paid by individuals who remain longer than ninety consecutive days as guests in a hotel, motel, lodging house or other similar establishment listed **[*725]** in the definition of "occupancy." There is no basis to depart from the straightforward language of the statute. Accordingly, the decision of the board is reversed. The record is unclear whether the Lowneys were properly assessed the unpaid room occupancy excise for individuals who remained at the motel for ninety consecutive days or fewer. The matter is remanded to the board for a determination of the tax, if any, due in accordance with this opinion.

So ordered.

MAD MAXINE'S WATERSPORTS, INC., & another [1] vs. HARBORMASTER OF PROVINCETOWN & another. [2]

1 Geneva Cook.

2 Town of Provincetown.

No. 05-P-1594

APPEALS COURT OF MASSACHUSETTS

67 Mass. App. Ct. 804*; *858 N.E.2d 760*; *2006 Mass. App. LEXIS 1279

September 15, 2006, Argued
December 13, 2006, Decided

SUBSEQUENT HISTORY: As Corrected January 3, 2007.
Review denied by *Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown, 448 Mass. 1104, 861 N.E.2d 29, 2007 Mass. LEXIS 65 (2007)*

PRIOR HISTORY: **[***1]** Barnstable. Civil action commenced in the Superior Court Department on July 30, 2002. The case was heard by Catherine A. White, J., on a motion for summary judgment.

COUNSEL: Evan T. Lawson for the plaintiffs.

Michele E. Randazzo for the defendants.

JUDGES: Present: Lenk, Berry, & Katzmann, JJ.

OPINION BY: BERRY

OPINION

[*804] **[**762]** BERRY, J. In May, 2002, the town of Provincetown approved **[*805]** an amendment to the Provincetown General Bylaws (hereinafter, the bylaw) that restricts to a 200-foot wide channel in Provincetown Harbor the use of propelled "personal watercraft" -- including, as most relevant to this appeal, propelled water "jet skis." [3] The bylaw also restricts the launching into the harbor of such watercraft to a single point at the West End Beach. Further, the bylaw provides that, while in the channel, these watercraft must operate at "headway speed," the slowest speed of operation that will maintain steerage. [4] The combined effect of these restrictions is that a jet ski or other personal watercraft may only pass through Provincetown Harbor in a designated 200-foot wide "lane" at headway speed and proceed to the ocean waters beyond the bounds of the harbor.

3 The bylaw at issue, § 13-4-2 of the Provincetown General Bylaws, defines "personal watercraft" as "a vessel propelled by a water-jet pump or other machinery as its primary source of propulsion that is designed to be operated by a person sitting, standing or kneeling on the vessel rather than being operated in the conventional manner by a person sitting or standing inside the vessel." Provincetown General Bylaws § 13-4-2-1-1. There is no dispute that the term "personal watercraft" in the bylaw includes the jet skis at issue in this case.

[*2]**

4 Although "headway speed" is not defined by the bylaw, it is elsewhere defined as "the slowest speed at which a personal watercraft . . . can be operated and maintain steerage way." *G. L. c. 90B, § 9A*, inserted by St. 1989, c. 681, § 1.

The town justifies adoption of the bylaw in light of the nature and use of Provincetown Harbor, and particular safety concerns and risks that would be presented were there to be widespread and unregulated use of personal watercraft and jet skis in the harbor. Provincetown Harbor is an active and popular swimming place and port of call for boating. Many small recreational craft move about the harbor. In addition, because Provincetown's harbor has a deep navigable channel, large commercial boats, ferries, and whale watching boats also move within the harbor. Given that Provincetown Harbor is so very busy, populated by people swimming and fishing and many boats large and small traveling about, the town asserts that the restrictions were crafted in order to lessen the danger personal watercraft and jet skis pose to people swimming in the **[***3]** harbor, and to reduce the risk of boat crashes as these individually operated watercraft bob and weave in the harbor waters -- a **[*806]** risk that is enhanced by the turbulence and waves flowing from the wake of the larger ships moving in the harbor. The town also justifies the bylaw as reducing the environ-

mental impact of engine discharge from personal watercraft, and as ameliorating the nuisance effect of the loud noise which echoes from their water-jet propulsion engines.

Soon after adoption, the bylaw was the subject of legal challenge by the plaintiffs, Mad Maxine's Watersports, Inc. (Mad Maxine's), a business that rents personal watercraft for customers' use in Provincetown Harbor, and Geneva Cook, an individual who has used, and says she wants to continue to use, personal watercraft within the harbor. The plaintiffs' lawsuit sought a declaration that the bylaw was in violation of various provisions of the Federal and State Constitutions, including art. 89, § 6, of the Amendments to the Massachusetts Constitution (the Home Rule Amendment), and the public trust doctrine, which, as further described herein, involves the rights of the public to conduct activities on waters and underlying **[***4]** tidelands of the **[**763]** Commonwealth below mean low water mark. [5], [6]

5 The case was originally filed in the Superior Court, but then was removed to the United States District Court on the ground that the complaint presented claims under the *equal protection clause of the Fourteenth Amendment to the United States Constitution*. A Federal judge denied the plaintiffs' motion for a preliminary injunction, ruling that the plaintiffs had failed to demonstrate a likelihood of success on their claims that the bylaw was constitutionally invalid. Following the denial of the preliminary injunction, and after a stipulation of dismissal of the Federal claims and certain of the State law claims, the United States District Court judge, upon request of the parties, remanded the case to the Superior Court for litigation of the remaining State law claims.

6 There were also criminal proceedings commenced in the Massachusetts District Court against Christine Maxwell, owner of plaintiff Mad Maxine's, for failure to pay fines imposed as a result of three citations issued pursuant to the bylaw. The criminal proceedings are not at issue here. We take judicial notice, however, that, as the record appendix reflects, Maxwell moved to dismiss the criminal complaint on grounds similar to those advanced in this appeal; namely, that the bylaw violated the Home Rule Amendment as inconsistent with *G. L. c. 90B, § 9A*. That motion to dismiss was denied by the District Court judge on the basis that the bylaw set forth reasonable restrictions and that *G. L. c. 90B, § 9A*, did not prohibit local regulation and did not place the exclusive right to regulate personal watercraft with the Commonwealth.

[*5]** In the Superior Court, the town moved for a summary judgment **[*807]** that the bylaw was validly enacted and enforceable. That summary judgment motion was allowed. The two challenges to the validity of the bylaw presented in this appeal [7] pose pure questions of law predicated on the Home Rule Amendment and the public trust doctrine governing sovereign rights over Massachusetts waterways and below tidelands. For the reasons that follow, we hold that the Provincetown bylaw is a lawful home rule provision and does not violate the public trust doctrine. Accordingly, we affirm.

7 The remaining claims advanced by the plaintiffs were the subject of a dismissal stipulation during the proceedings in the United States District Court. See note 5, *supra*.

1. *The Home Rule Amendment*. Under the Home Rule Amendment, "[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or bylaws, exercise any power or function which the general court has power to confer upon it, *which is not inconsistent with* **[***6]** *the constitution or laws enacted by the general court* . . . ." (emphasis supplied). Article 89, § 6, of the Amendments to the Massachusetts Constitution. Considerable latitude is given to municipalities in enacting local bylaws. Only enactments that present a "sharp conflict between the local and State provisions" will be held invalid. *Rogers v. Provincetown, 384 Mass. 179, 181, 424 N.E.2d 239 (1981)*, quoting from *Bloom v. Worcester, 363 Mass. 136, 154, 293 N.E.2d 268 (1973)*. "The sharp conflict necessary to repugnancy 'appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local bylaw.'" *Rogers v. Provincetown, supra*, quoting from *Grace v. Brookline, 379 Mass. 43, 54, 399 N.E.2d 1038 (1979)*. In other words, "sharp conflict" requires either a contravention of the statutory purpose or an intent by the Legislature to preclude local regulation.

The plaintiffs contend that the Provincetown bylaw is in sharp conflict with, and would defeat the purposes of, a State statute, *G. L. c. 90B, § 9A*. That statute **[***7]** provides, in relevant part, as follows:

> "No person shall operate a jet ski, surf jet **[**764]** or wetbike [8] **[*808]** (a) on waters of the commonwealth unless the person is sixteen years of age or older, (b) within one hundred and fifty feet of a swimmer, shore or moored vessel, except at headway speed, (c) on waters of the commonwealth of less than seventy-five

> acres, (d) without wearing an approved personal flotation device or (e) between sunset and sunrise."

G. L. c. 90B, § 9A, inserted by St. 1989, c. 681, § 1. According to the plaintiffs, the Provincetown bylaw infringes an affirmative right to use a personal watercraft on Commonwealth waterways, which right inherently lies within the above quoted provisions of *§ 9A*, and which right, by virtue of its Statewide statutory application, displaces local authority under home rule. Specifically, the plaintiffs submit that because *§ 9A* restricts the operation of personal watercraft on waters of the Commonwealth less than seventy-five acres, the converse applies: that is, if the waters are greater than seventy-five acres then, say the plaintiffs, there is an absolute right to operate a personal watercraft **[***8]** or jet ski on the broader waterways. [9] From there, the plaintiffs extrapolate to the proposition that the Provincetown bylaw is an unlawful regulation under the Home Rule Amendment because the bylaw effectively bans the free operation of personal watercraft in Provincetown Harbor, cutting off the inherent right of watercraft use the plaintiffs see as implicitly residing in *G. L. c. 90B, § 9A*.

> 8 The statute elsewhere defines "jet skis" as "a ski propelled by machinery and designed to travel over water"; "surf jet" as "a surfboard propelled by machinery and designed to travel over water"; and "wetbike" as "a vessel designed to travel over water, supported by skis propelled by machinery." *G. L. c. 90B, § 1*, as amended by St. 1985, c. 498, §§ 1-3.

> 9 Although it is not clearly articulated in their briefs, the plaintiffs seem to concede that the right to operate a personal watercraft and jet skis only "vests" when all five standards set forth in *§ 9A* are met. In this appeal, it is the element in *§ 9A* relating to the acreage of the waterway that is principally cited as posing the sharp conflict between the Provincetown bylaw and this State statute.

[*9]** The first, and insurmountable, problem with the plaintiffs' novel theory of a sharp conflict between the Provincetown bylaw and the Commonwealth's law, *G. L. c. 90B, § 9A*, is that the entire theory rests on a nonexistent absolute right (to operate personal watercraft) that is nothing more or less than virtually **[*809]** imagined as lying within *§ 9A*. [10], [11] *Section 9A* is not subject **[**765]** to the reading the plaintiffs would engraft upon it. The section, whether on its face or by implication, cannot be read as conferring an absolute and unregulable right on individuals to operate jet skis or other personal watercraft in waterways of greater than seventy-five acres. Rather, the plain words of *G. L. c. 90B, § 9A*, are more reasonably construed as setting forth minimum regulatory guidelines and standards for the operation of personal watercraft. "[T]he primary source of insight into the intent of the Legislature is the language of the statute." *International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 853, 443 N.E.2d 1308 (1983)*. The plain terms of *§ 9A* codify quotidian regulatory details consonant with the setting of minimum standards for personal **[***10]** watercraft **[*810]** use and operation, e.g., the minimum distance to be maintained as a buffer between the watercraft and a swimmer or other vessel, hours of approved use, a minimum age of sixteen years for an operator, and a requirement of wearing approved flotation devices. Given this micro level of detail in *§ 9A*, the plain language of the statute supports the minimal standards construction. "Where the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Anderson Street Assocs. v. Boston, 442 Mass. 812, 816, 817 N.E.2d 759 (2004)*, quoting from *Gurley v. Commonwealth, 363 Mass. 595, 598, 296 N.E.2d 477 (1973)*. Accordingly, we reject the plaintiffs' argument that the Provincetown bylaw is an invalid home rule regulation, because the bylaw is not in "sharp conflict" with *G. L. c. 90B, § 9A*.

> 10 In seeking to invoke an absolute usage right, the plaintiffs rely heavily on *Rogers v. Provincetown, 384 Mass. at 181-182*, and *American Motorcyclist Assn. v. Park Commn. of Brockton, 412 Mass. 753, 755, 592 N.E.2d 1314 (1992)*. Both cases are distinguishable and involve granted statutory rights to operate motor vehicles on the public roadways of the Commonwealth. The statutory provision at issue in *Rogers* expressly stated that "[e]very person operating a motorized bicycle upon a way *shall have the right* to use any public ways in the commonwealth . . ." (emphasis supplied). *Rogers v. Provincetown, 384 Mass. at 179*, quoting from *G. L. c. 90, § 1B*, inserted by St. 1976, c. 261, § 4. At issue in *American Motorcyclist* was another portion of *G. L. c. 90*, which refers to the "[r]ight to operate" a motor vehicle "conferred by a license issued under section eight, a learner's permit issued under section eight B, or by reciprocity to nonresidents under sections three and ten." *412 Mass. at 757*, quoting from *G. L. c. 90, § 1*. The statute as a whole "establish[es] that those who fulfil the requirements of *§ 8* or *§§ 3* and *10* also *have a right to operate on the ways of the Commonwealth*" and, accordingly, the *American Motorcyclist* court invalidated a proposed ban on motorcycles on roadways within Brockton parks. *412 Mass. at*

757 (emphasis supplied). There are, however, no similar statutory rights to operate a watercraft set forth in *G. L. c. 90B*, and the aforecited cases do not advance the plaintiffs' theory for invalidating the Provincetown bylaw.

[*11]**

11 The plaintiffs' contention that the bylaw is a total ban on the operation of personal watercraft is incorrect. The bylaw is not an outright prohibition, but rather restricts the use of such watercraft to a portion of the harbor to traverse within a defined channel and proceed beyond the harbor's inner boundaries. Although argued in the extreme by both sides -- the plaintiffs contending that the bylaw is an absolute ban, and the defendants contending that it is not such a ban but, even if it were, a total ban by a town would be valid and enforceable -- this bylaw and this case does not present the issue -- and we need not reach the question -- whether a municipality could, consonant with *G. L. c. 90B, § 9A* and *§ 15*, adopt a total ban on personal watercraft within its waters under the Home Rule Amendment.

We turn next to the related basis of challenge to this home rule regulation by Provincetown, which is that the bylaw is void because the field of regulation of personal watercraft is exclusive to the sovereign Commonwealth. A bylaw enacted **[***12]** by any town exceeds that town's power under the Home Rule Amendment if "the legislative intent to preclude local action is clear." *Rogers v. Provincetown, 384 Mass. at 181*, quoting from *Grace v. Brookline, 379 Mass. at 54*.

However, the plaintiffs' claim that local action is precluded, and that exclusive sovereignty rests in the Commonwealth alone, is addressed and resolved adversely to the plaintiffs by the Legislature's express delegation in *G. L. c. 90B, § 15*, inserted by St. 1960, c. 275, § 2, which provides, in relevant part:

> "(*a*) The provisions of this chapter shall govern the numbering, operation, equipment and all other matters relating thereto of any vessel subject to the provisions of this chapter or of any rule or regulation made under authority hereof . . . .
>
> "(*b*) Nothing in this section shall be construed as prohibiting any city or town from regulating, by ordinance or bylaw, not contrary to the provisions of **[**766]** this chapter or of any rule or regulation made under authority hereof, other than numbering, of such vessels on such waters of the commonwealth as lie within the city or town, or **[***13]** such activities which take place thereon. . . .
>
> **[*811]** "(*c*) No such ordinance or bylaw shall be valid unless it shall have been approved by the director [of the division of law enforcement of the Department of Fisheries, Wildlife and Environmental Law Enforcement] and published in a newspaper of general distribution in said city or town not less than five days before the effective date thereof." [12]

As is clear from *§ 15(b)* and *(c)*, the Legislature empowered municipalities to "regulat[e] . . . vessels on such waters of the Commonwealth as lie within the city or town, or such activities which take place thereon," so long as such regulation is not contrary to the provisions of *c. 90B* or its implementing rules or regulations, and so long as prior notice and approval by the appropriate State official are given. This broad legislative grant to municipalities of the power to regulate **[***14]** "vessels" is expansive enough to include the subset of personal watercraft and jet-skis, as the definition of "vessel" under *c. 90B* encompasses "watercraft of every description." *G. L. c. 90B, § 1*, inserted by St. 1960, c. 275, § 2.

12 It is not in dispute that here the town complied with the approval and publication requirements of *§ 15(c)*.

Given the *G. L. c. 90B, § 15*, delegation to cities and towns, we discern no clear legislative intent to preclude local regulation. Furthermore, the setting of minimum standards by the Legislature on a Statewide basis in *G. L. c. 90B, § 9A*, still leaves ample room for municipal regulation of personal watercraft under the Home Rule Amendment.

2. *The public trust doctrine.* "Under the public trust doctrine, sovereigns hold shorelands in trust for the use of the public. See *Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 631-632, 393 N.E.2d 356 (1979)* (providing history of public trust doctrine). . . . The Commonwealth, as successor to the colonial authorities, owns and controls lands seaward of the flats. See *Michaelson v. Silver Beach Improvement Ass'n, Inc., 342 Mass. 251, 253-254, 173 N.E.2d 273 (1961)*. These lands are held in trust by the Commonwealth **[***15]** to preserve the general rights of the public. See *id. at 253*, quoting *Home for Aged Women v. Commonwealth, 202 Mass. 422, 427, 89 N.E. 124 (1909)* ('The waters and the land under [waters] beyond the line of private ownership are held by the State, both **[*812]** as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public')." *Fafard v.*

Conservation Commn. of Barnstable, 432 Mass. 194, 198-199, 733 N.E.2d 66 (2000). The Commonwealth is "sovereign[] hold[ing] shorelands in trust for the use of the public," and "[t]he Commonwealth's authority with respect to [lands seaward of the flats] is subject only to Federal law, the State Constitution, and the State's obligations as trustee." *Id. at 199* (footnote omitted). The plaintiffs argue that Provincetown's adoption of the bylaw is an encroachment upon the public trust. The argument advanced is that the bylaw restricts the public's right of free navigation on the waters of the Commonwealth, and that free navigable waters, such as in Provincetown Harbor, are subject to regulation exclusively under the Commonwealth's sovereign power.

[767]** This argument **[***16]** fails at the threshold. The exclusive sovereign power recognized in the public trust doctrine is subject to Legislative delegation to municipalities. "This history of the origins of the Commonwealth's public trust obligations and authority, as well as jurisprudence and legislation spanning two centuries, [establishes] that only the Commonwealth, *or an entity to which the Legislature properly has delegated authority, may administer public trust rights*." (emphasis supplied). *Ibid.* There has been such a delegation here by virtue of *G. L. c. 90B, § 15*, wherein the Legislature plainly has authorized towns to regulate vessels, including personal watercraft. Specifically in *§ 15(b)*, the Legislature granted city and towns the authority to regulate "by ordinance or bylaw . . . vessels on such waters of the commonwealth as lie within the city or town, or such activities which take place thereon." [13] There is, accordingly, no **[*813]** encroachment upon the Commonwealth's sovereignty under the public trust doctrine. [14]

13 The plaintiffs cite *Fafard v. Conservation Commn. of Barnstable, 432 Mass. at 200*, in support of invalidating the Provincetown bylaw as inconsistent with the public trust doctrine. The Barnstable bylaw at issue in *Fafard*, however, was quite different. The Barnstable bylaw sought to vest the power to protect "public trust rights in trustlands" in a local conservation commission, which under the Barnstable bylaw had authority to promulgate regulations on activities affecting wetlands, and in these undertakings, "to regulate work in and around wetlands more strictly than does the State's wetlands protection act." *Id. at 196*. The court held that the Legislature had not delegated to municipalities the range and breadth of powers to protect the public trust that Barnstable sought to exercise by adopting regulations stricter than any imposed by the sovereign Commonwealth under the public trust doctrine. *Ibid.* Unlike the Barnstable bylaw challenged and held invalid in *Fafard*, the Provincetown bylaw here does not purport to administer the public trust in a manner inconsistent with State laws, but rather flows from, and is consistent with, the Legislature's delegation of power to towns and cities to regulate vessels upon local waterways under *G. L. c. 90B, § 15*.

[*17]**

14 The main limitation on a town's exercise of the power to regulate vessels under *G. L. c. 90B, § 15(b)*, is that the regulation must not be "contrary to the provisions of [*c. 90B*] or of any rule or regulation made under authority [t]hereof." For the reasons addressed above, particularly in part 1, the Provincetown bylaw is not contrary to the provisions of *c. 90B*, including *§ 9A*.

3. *The injunction against future violations.* In the final form of the judgment, a permanent injunction entered restraining the plaintiffs from engaging in further violations of the bylaw. The plaintiffs argue that the defendants had waived their claim for injunctive relief oral argument in open court at the hearing on the motion for summary judgment.

The record does not clearly reflect whether the request for injunctive relief was indeed waived. In any event, the record on the claim for injunctive relief is undeveloped. On this record, we cannot ascertain whether (or if so, how) the judge determined that the requested order promotes the public interest (or, in the alternative, **[***18]** that the equitable relief will not adversely affect the public). See, e.g., *Edwards v. Boston, 408 Mass. 643, 647, 562 N.E.2d 834 (1990)*. More fundamentally, on this record, we see no reason to diverge from the usual rule that equitable relief is not ordinarily available to restrain violations of local ordinances or bylaws that may result in criminal proceedings. [15] See **[**768]** *Revere v. Aucella, 369 Mass. 138, 146-147, 338 N.E.2d 816 (1975)*, appeal dismissed sub nom. *Charger Invs., Inc. v. Corbett, 429 U.S. 877, 97 S. Ct. 225, 50 L. Ed. 2d 159 (1976)* (denying **[*814]** injunction to enforce local criminal ordinance in the absence of express statutory authority), and authorities cited. Accordingly, we vacate that portion of the amended judgment (paragraphs 1 and 2) which permanently enjoined the plaintiffs from violating the bylaw. [16] Otherwise, the amended judgment in the defendants' favor, declaring the Provincetown bylaw to be valid and enforceable, and dismissing other claims of the plaintiffs, is affirmed. [17]

15 The bylaw provides for enforcement "by the Provincetown Harbormaster or his designee, the Provincetown Police Department, or the Massachusetts Environmental Police," and monetary fines are specified for violations. In the instant case, the record reflects that the harbormaster ini-

tially issued verbal warnings to a supervisor at Mad Maxine's. When these verbal warnings were unheeded, written citations were issued to Mad Maxine's. The written citations, pursuant to the bylaw, imposed a fine of $ 100 per violation. Upon Mad Maxine's failure to pay the fines, criminal proceedings were instituted against the owner of Mad Maxine's. See note 6, *supra*.

[*19]**

16 Enforcement actions and criminal proceedings would still of course be available to address any future violations of the bylaw.

17 The defendants have requested an award of appellate attorney's fees and costs in connection with this appeal. See *Mass. R.A.P. 25*, as appearing in 376 Mass. 949 (1979). Although we reject the plaintiffs' primary challenges to the judgment, we do not consider the appeal frivolous. Although it is true that several courts had rejected the plaintiffs' contentions, we do not believe, as the defendants seem to, that this stripped the plaintiffs of their right to pursue appellate relief in this court. We deny the defendants' request.

So ordered.

CHARLES F. McCOY, JR. vs. TOWN OF KINGSTON.

No. 06-P-396.

APPEALS COURT OF MASSACHUSETTS

68 Mass. App. Ct. 819; 864 N.E.2d 1251; 2007 Mass. App. LEXIS 472

November 14, 2006, Argued
May 2, 2007, Decided

SUBSEQUENT HISTORY: As Modified May 18, 2007.
Review denied by *McCoy v. Town of Kingston, 449 Mass. 1107, 2007 Mass. LEXIS 508 (2007)*

DISPOSITION: Judgment affirmed.

COUNSEL: John T. Landry, III, for the plaintiff.

Gregg J. Corbo for the defendant.

JUDGES: Present: Doerfer, Katzmann, Vuono, JJ.

OPINION BY: KATZMANN

OPINION

[1253]** **[*819]** KATZMANN, J. Charles F. McCoy, Jr., an elected tax collector for the town of Kingston (town), filed suit against the town in the Superior Court seeking declaratory relief and indemnification for legal fees incurred in a dispute with a Kingston taxpayer. On cross motions for summary judgment, the judge determined that McCoy was not entitled to indemnification due to (1) the inapplicability of *G. L. c. 258, § 13*, to the dispute; and (2) his failure to seek the selectmen's prior approval before incurring private counsel fees, as required by a 1994 town policy. On appeal, McCoy argues that both of the judge's determinations **[*820]** were erroneous. Because McCoy failed to seek prior approval under the town policy, we affirm the judgment.

Background. We set out the material facts of the case, which are not in dispute and present only questions **[***2]** of law on summary judgment. See *Annese Elec. Servs., Inc. v. Newton, 431 Mass. 763, 764, 730 N.E.2d 290 & n.2 (2000)*. On May 10, 1980, the town accepted the provisions of *G. L. c. 258, § 13*. That section of the Massachusetts Tort Claims Act provides:

> "Any city or town [accepting this section] shall indemnify and save harmless municipal officers, elected or appointed from personal financial loss and expense including reasonable legal fees and costs, if any, in an amount not to exceed one million dollars, arising out of any claim, demand, suit or judgment by reason of any act or omission, except an intentional violation of civil rights of any person, if the official at the time of such act or omission was acting within the scope of his official duties or employment."

G. L. c. 258, § 13, as amended by St. 1982, c. 176, § 1. After a vote in November, 1994, the town selectmen notified all town officials of the town's policy not to pay special counsel unless the selectmen approved the appointment of such counsel prior to any costs being incurred (the 1994 town policy).

At all times material to this case, McCoy was **[***3]** the duly elected tax collector for the town. In April, 1998, in connection with his attempts to collect excise taxes, a dispute arose between McCoy and Liddell Brothers, Inc. (Liddell). Liddell wrote a letter complaint dated May 1, 1998, to the town selectmen about the dispute with McCoy. [1] The letter stated in part, "Please review **[*821]** the circumstances of this matter and advise me as to my alternatives. Should this matter not be solved, I will be forced to seek relief through our attorneys." On May 20, 1998, Liddell's counsel wrote to McCoy directly, as tax collector, about the dispute, stating in part as follows:

> **[**1254]** "Please be advised that unless this matter is resolved within one (1) week from the date hereof, my client has instructed me to present and bring all available claims against all responsible parties, both individually and in their offi-

> cial capacity, seeking damages, including any damage to reputation."

Without prior approval of the town selectmen, McCoy retained a law firm as private counsel, initially paying a retainer of $ 2,500.

> 1 According to Liddell's letter complaint, McCoy sent excise tax bills to Liddell on their vehicles, including various trailers. With the exception of eighteen bills of $ 5 apiece (totaling $ 90) for eighteen trailers which Liddell no longer owned (and for which it had submitted applications for abatement as instructed by the town assessor), Liddell attempted to pay its entire remaining bill of $ 5,680 on April 10, 1998. McCoy refused to accept payment without the $ 90, or to follow Liddell's instructions to apply the check to the remaining vehicles and trailers. On April 30, 1998, McCoy's office returned Liddell's check with demands (dated April 13, due April 27) which, with demand fees and interest, totaled an additional $ 1,326.05. When Liddell's comptroller complained on April 30, McCoy told her that Liddell had until May 1 to make payment, or he would issue warrants on all of Liddell's 250 vehicles, totaling in excess of $ 6,000.

[*4]** On May 28, 1998, Liddell's counsel wrote to McCoy's counsel, stating in pertinent part:

> "[P]lease be advised that if this matter is not resolved forthwith, my client has instructed me to commence an action in the Massachusetts State Court seeking both Declaratory Relief and a Writ of Mandamus, as well as an action in the Federal District Court for your client's blatant violations of my client's Constitutional rights secured by the *Fifth*, *Ninth* and *Fourteenth Amendments*, pursuant to *42 U.S.C. 1983*. In addition, my client will undoubtedly seek damages for your client's intentional conduct in violation of *Massachusetts General Laws Chapter 12 § 11*, and for intentional infliction of emotional distress, tortious interference with contractual relations and tortious interference with advantageous relations. In all, these actions will seek all available compensatory and punitive damages from your client, plus reimbursement for any and all attorney's fees and costs, which have resulted directly or consequentially from Mr. McCoy's conduct. (As a courtesy, I refer you to the matter of *Larry Slot, et als., v. Town of Kingston, et als.* **[***5]** , U.S. District Court, C.A.No. 90-11826, a decision with which I am sure Mr. McCoy is familiar.)
>
> "As these actions will be brought against Mr. McCoy both in his official capacity as tax collector, as well as individually, **[*822]** I urge you and your client to carefully consider the potential outcomes and your client's likely exposure as a result of his conduct, and to contact me immediately to discuss this matter prior to the initiation of litigation.
>
> ". . . If I have not heard from you within seven (7) days from the date of this letter I will take any and all necessary steps to protect my client."

The chairman of the town board of selectmen was copied in both the May 20 and May 28 letters.

Subsequently, prior to the filing of any complaint, Liddell and McCoy, individually and as tax collector, entered into a mutual release and settlement agreement. Liddell agreed to pay the full amount of the excise taxes due with interest, a total of $ 6,099.30. In short, Liddell paid the town just $ 419.30 more than the original payment which it had tendered on April 10, 1998.

McCoy's counsel billed him $ 12,170.36. [2] McCoy submitted a request for indemnification to the town, which, **[***6]** in May, 2000, voted to deny the request. McCoy's counsel brought suit against McCoy to recover legal fees and obtained a judgment against him in the amount of $ 11,669.92. By complaint filed June 24, 2002, McCoy brought this action against the town seeking declaratory relief and indemnification. On cross motions for summary judgment, the Superior Court judge, relying on general language in *Triplett v. Oxford, 439 Mass. 720, 724, 791 N.E.2d 310 (2003)* (*Triplett*), **[**1255]** concluded that none of the various communications from Liddell or Liddell's counsel reflected a "claim" or a "demand" under *G. L. c. 258, § 13*. In addition, the judge concluded that the town properly could impose a supplemental requirement of the selectmen's prior approval before incurring any liability under *§ 13*, and that McCoy's failure to obtain such approval barred his claim.

> 2 A portion of these fees were related to internal employment disputes concerning McCoy's job performance and compensation. McCoy correctly does not claim any right under *§ 13* to indemnifi-

cation on these matters, and they are not relevant to this appeal.

[*7]** *Discussion.* On appeal, McCoy contests both rationales for the decision. We address each argument in turn.

[*823] 1. *Application of G. L. c. 258, § 13.* As noted, on May 10, 1980, the town accepted the indemnification provision of the Massachusetts Tort Claims Act, *G. L. c. 258, § 13*, and is required to indemnify McCoy, as a municipal officer, if he meets the requisite criteria. Thus, at issue is whether McCoy's action for indemnification arises "out of any claim, demand, suit or judgment" against him as set forth by *§ 13*. We conclude that his action does arise out of a "claim." [3]

> 3 As Liddell never filed a civil action against McCoy, McCoy's present action does not arise out of a "suit" or "judgment" as defined in *G. L. c. 258, § 13*. See *Triplett, 439 Mass. at 724* (defining "suit" as denoting a claim for damages resulting from a tort violation and "judgment" as referring to a final judgment in a tort case). As we base our decision on the statutory term "claim," we also need not decide whether the term "demand" applies under the circumstances of this case.

[*8]** The issue is whether McCoy's request for indemnification of attorney's fees arises out of a claim of Liddell against McCoy in his capacity as Kingston tax collector. The town asserts that the judge was correct in concluding that because Liddell never actually filed a civil action against McCoy, McCoy is not entitled to reimbursement for attorney's fees. In support of this proposition, Kingston relies on *Triplett, 439 Mass. at 724*. In *Triplett*, the Supreme Judicial Court explained that the word "claim" as it is used throughout c. 258 refers to a civil action for tort damages. *Ibid.* Here, because the Liddell dispute did not qualify as a civil action for tort damages, the judge determined that it was not a claim under *§ 13*.

We do not agree with the judge's application of *Triplett*. There, the court was not faced with the issue presented here by the Liddell dispute, which is rooted in tort. Rather, in *Triplett*, presented with the question whether a criminal indictment or ethics charges constituted a "claim" cognizable for indemnification under *§ 13*, the Supreme Judicial Court examined whether they constituted a "claim" "in any ordinary sense of the word, **[***9]** " *ibid.*, and determined that they did not. Cf. *Irwin v. Ware, 392 Mass. 745, 772, 467 N.E.2d 1292 (1984)* (interpreting the term "claim" as "referring to a demand for all damages arising from a tort"). The *Triplett* court was not presented with the question whether threatened, imminent filing of a specific suit in tort can **[*824]** constitute a claim for purposes of indemnification under *§ 13* where a civil action has not yet been instituted.

To answer the question, "we closely examine the statute in light of the standard principles that statutes are to be interpreted in a commonsense way which is consistent with the statutory scheme." *Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass. App. Ct. 186, 191-192, 837 N.E.2d 1147 (2005)*. Thus,

> "we look first to the language of the statute. '[S]tatutory language is the principal source of the insight into legislative purpose.' *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 392 Mass. 407, 415, 467* **[**1256]** *N.E.2d 87 (1984)*. . . . When the words of a statute are clear, they are to be given their ordinary and natural meanings. . . . If the meanings are unclear, the statute must be interpreted 'according to the **[***10]** intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.' . . . In addition, 'a statute should be read as a whole to produce an internal consistency.'"

Adoption of Marlene, 443 Mass. 494, 497-498, 822 N.E.2d 714 (2005). Moreover, "[w]here words in a statute are used in one part of a statute in a definite sense, they should be given the same meaning in another part of the statute." *Triplett, 439 Mass. at 724*, quoting from *Hallett v. Contributory Retirement Appeal Bd., 431 Mass. 66, 69, 725 N.E.2d 222 (2000)*. Furthermore, "a statute should not be read in such a way as to render its terms meaningless or superfluous." *Bynes v. School Comm. of Boston, 411 Mass. 264, 268, 581 N.E.2d 1019 (1991)*.

Here, *§ 13* contemplates a continuum of separate and different events -- "claim, demand, suit or judgment" -- which can trigger indemnification for a municipal officer. Interpreting "claim" to explicitly **[***11]** require the filing of a civil action is not only not provided by the face of the statute, but is inconsistent with the use of the term "claim" in other sections of the Massachusetts Tort Claims Act, *G. L. c. 258, §§ 4* and *5*. Specifically, *§ 4* requires that "[a] civil action shall not be instituted

against a public employer on a claim for damages under this [*825] chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer . . . ." *G. L. c. 258, § 4*, inserted by St. 1978, c. 512, § 15. This language therefore explicitly recognizes that a claim exists before the filing of a civil action. See *Lopez v. Lynn Hous. Authy., 440 Mass. 1029, 1030, 800 N.E.2d 297 (2003)* ("We have stated that there must be strict compliance with the requirement of *G. L. c. 258, § 4*, that the plaintiff present his or her claim to the executive officer of a public employer prior to filing suit. See, e.g., *Weaver v. Commonwealth, 387 Mass. 43, 47, 438 N.E.2d 831 [1982]*. Without such compliance, 'the executive officer with the authority to settle a claim [***12] could not be assured of an adequate opportunity to investigate the circumstances surrounding that claim in order to determine whether an offer of settlement should be made.' *Id. at 48*"); *Garcia v. Essex County Sheriff's Dept., 65 Mass. App. Ct. 104, 107, 837 N.E.2d 284 (2005)* (presentment of claim is required under *§ 4* prior to the filing of a civil tort suit). [4]

4 It is not material to our decision whether Liddell's letter complaint to the town selectmen or its May 20 or May 28 letters qualified as presentment letters under *§ 4*.

Likewise, the judge's interpretation of the term "claim" in *§ 13* is inconsistent with its usage in *§ 5*. *Section 5* provides in part that the executive officer of a public employer "shall not arbitrate, compromise or settle any . . . claim [for damages] before it has been presented to him in writing or after six months have passed from the date upon which such claim was presented to him." *G. L. c. 258, § 5*, inserted by St. 1978, c. 512, [***13] § 15. The language of this section provides that the claim only need be presented, not that it be in the form of a civil action against the municipality. Indeed, the settlement of claims, prior to litigation, is a major objective of the act. *Irwin, 392 Mass. at 770*.

[**1257] The town's position would require a party seeking indemnification for a "claim" to prove that a civil action was filed against him. Cf. *Triplett, 439 Mass. at 723* ("we do not 'read into [a] statute a provision which the Legislature did not see fit to put there'"), quoting from *King v. Viscoloid Co., 219 Mass. 420, 425, 106 N.E. 988 (1914)*. Furthermore, requiring a claim to be in the form of a civil action is not only contrary to the purpose of *§§ 4* and *5*, but also makes the term "suit" in *§ 13* superfluous. See *Bynes, 411 Mass. at 268*.

[*826] Here, Liddell made several written requests upon both McCoy and the town demanding resolution of the excise tax issue. The letters expressly threatened legal action and asserted that tortious interference with advantageous relationships were among the "claims" in an impending cause [***14] of action. Moreover, the subject line of each of the latter two letters was "Liddell Brothers, Inc. vs. Charles McCoy, Tax Collector, et als." Although a cause of action had yet to be filed, the underlying "claims" were identified and in existence. Recognizing the existence of these "claims," McCoy's attorney acted to settle the matter before the threatened litigation became necessary. Viewed particularly in light of their specificity -- setting forth asserted grievances, litigation consequences, and the imminence of action -- the Liddell letters, which were provided to the town's board of selectmen, constitute claims in the "ordinary sense of the word." *Triplett, 439 Mass. at 724*. Such a determination here is consistent with the policy underlying *§ 13*, that "public indemnification of public officials serves in part to encourage public service." *Filippone v. Mayor of Newton, 392 Mass. 622, 629, 467 N.E.2d 182 (1984)*.

2. *Application of 1994 policy*. The town's general by-laws provide that "[t]he Selectmen shall have the power to institute or defend suits and to employ Counsel at any time if in their judgment the interests of the town so require." In accordance [***15] with its authority with respect to the employment of counsel, the town's board of selectmen established in a memorandum the 1994 policy providing that "no special counsel will be paid unless the Board of Selectmen approves the appointment of that counsel *prior to any costs being incurred*" (emphasis original). That policy further states that "[u]se of Town Counsel will continue to be determined on a case-by-case basis by the Town Administrator." McCoy concedes that he engaged private counsel to represent him without seeking or obtaining prior approval from the town as required by the 1994 policy. McCoy argues that despite this failure and violation of the policy, he is still entitled to indemnification because the policy is inconsistent with the provisions of *G. L. c. 258, § 13*. As did the Superior Court judge, we disagree.

[*827] Municipal by-laws are entitled to a presumption of validity, and a town exceeds its authority when it passes an ordinance or by-law inconsistent with the Constitution or the laws of the Commonwealth. *Take Five Vending, Ltd. v. Provincetown, 415 Mass. 741, 744, 615 N.E.2d 576 (1993)*. The plaintiff bears the burden of invalidating [***16] the by-law, and "enforcement will not be refused unless it is shown beyond reasonable doubt that [it] conflict[s] with the applicable enabling act or the Constitution." *Grace v. Brookline, 379 Mass. 43, 50, 399 N.E.2d 1038 (1979)*, quoting from *Crall v. Leominster, 362 Mass. 95, 102, 284 N.E.2d 610 (1972)*. "In determining whether a local ordinance or by-law is inconsistent with a State statute, we have given municipalities 'considerable latitude,' [**1258] requiring a 'sharp conflict' between the ordinance or by-law and the

statute before invalidating the local law." *Take Five Vending, Ltd., 415 Mass. at 744*, quoting from *Bloom v. Worcester, 363 Mass. 136, 154, 293 N.E.2d 268 (1973)*. This conflict arises when the Legislature intended to preclude local action or the local ordinance or by-law inhibits the achievement of the purpose of the statute. *Take Five Vending, Ltd., 415 Mass. at 744*.

In the present case, there is not a "sharp conflict" between the procedural requirements of the Kingston policy and the substantive indemnification provisions of *§ 13*. The purpose of *§ 13*, where accepted by a town, is to provide municipal officers with mandatory **[***17]** indemnification for personal financial loss and expenses, including reasonable legal fees and costs, subject to specified conditions. *G. L. c. 258, § 13*. The by-law and the 1994 policy facilitate the orderly processing of requests for indemnification so that the town can better manage its financial affairs. Neither the by-law nor the policy change the basis upon which a municipal employee is entitled to indemnification, and if an indemnification request is rejected, the employee has legal recourse to have the propriety of the rejection determined. See *Dugan v. Selectman of Dartmouth, 413 Mass. 641, 642, 602 N.E.2d 563 (1992)*; *Triplett, 439 Mass. at 721*.

McCoy argues that *§ 13* entitles a public employee to retain counsel of his own choosing, and then to seek indemnification for these expenses. This interpretation would erode, if not effectively eliminate, any screening role or gatekeeping function that enables the town to retain a degree of control over indemnification **[*828]** expenses, or to minimize its own liability. As the judge observed, such an interpretation would give "a town employee . . . a blank check to retain any attorney, regardless **[***18]** of qualifications and fee rates, even in a matter such as this where the right to indemnity is questionable." As such, the interpretation urged by McCoy would conflict impermissibly with the well-established power of municipal government to designate the manner in which funds for legal services will be expended, including the retention of counsel. See *Board of Public Works of Wellesley v. Selectmen of Wellesley, 377 Mass. 621, 625, 387 N.E.2d 146 (1979)* (acknowledging town's general power to "control expense and improve management"). Consistent with that power, the town by-law and policy create a supplemental screening mechanism by which the town can determine for itself whether a town official actually requires counsel separate and apart from the town counsel. See *Filippone, 392 Mass. at 628-629* (municipalities retain the authority to enact procedural requirements for processing requests for indemnification). Indeed, this procedure for prior approval promotes the indemnification condition in *§ 13* that legal fees and costs be "reasonable." Moreover, it assists the town to coordinate litigation liability under *G. L. c. 258, § 2*, which provides **[***19]** that public employers are liable for negligent or wrongful acts or omissions by public employees. In sum, there is not a sharp conflict between the town's 1994 policy and *§ 13*. Rather, the policy is a reasonable supplement to *§ 13*, and does not prevent its operation.

Judgment affirmed.

SHERYL PARKER vs. TOWN OF NORTH BROOKFIELD.

No. 06-P-167

APPEALS COURT OF MASSACHUSETTS

68 Mass. App. Ct. 235; 861 N.E.2d 770; 2007 Mass. App. LEXIS 157; 25 I.E.R. Cas. (BNA) 1283

October 5, 2006, Argued
February 15, 2007, Decided

SUBSEQUENT HISTORY: Modified March 6, 2007. Rev denied by *Parker v. Town of N. Brookfield, 448 Mass. 1108, 864 N.E.2d 23, 2007 Mass. LEXIS 235 (2007)*

PRIOR HISTORY: **[***1]** Worcester. Civil action commenced in the Superior Court Department on October 7, 2004. The case was heard by Bruce R. Henry, J., on motions for summary judgment.

DISPOSITION: Judgment affirmed.

COUNSEL: Gary H. Goldberg for the plaintiff.

Nancy Frankel Pelletier for the defendant.

JUDGES: Present: Greenberg, Smith, & Gelinas, JJ.

OPINION BY: GELINAS

OPINION

[*235] **[**771]** GELINAS, J. Sheryl Parker (Parker), employed by the town of North Brookfield (town) as "dog officer/animal control officer," [1] was discharged effective July 1, 2004, when her position was eliminated and moved to the police department. As a town employee, Parker was eligible to obtain health insurance benefits **[*236]** from the town pursuant to *G. L. c. 32B*. However, when she requested enrollment in the town's insurance plan upon commencement of the new fiscal year, the town terminated Parker and eliminated her position. The town made this decision purely on the basis of avoiding the cost of providing her with insurance. Parker filed a three-count complaint: violation of *G. L. c. 32B* (count I); wrongful termination in violation of public policy (count II); and gender discrimination in violation of *G. L. c. 151B* (count III). After brief discovery, the parties agreed **[***2]** to a joint stipulation of facts, and filed cross motions for summary judgment on counts I and II of the complaint. A Superior Court judge allowed the town's motion and denied that of Parker. The parties then jointly stipulated to dismissal of count III, the complaint for violation of *G. L. c. 151B*. The court entered final judgment, dismissing count III and granting summary judgment to the town on counts I and II. Parker's appeal is now before us.

1 The source and responsibilities of Parker's position are not specified in the record or in the parties' stipulation of facts. On appeal the town suggests that she was appointed pursuant to *G. L. c. 140, § 151*.

We take the facts from the parties' joint stipulation, presented to the court in support of the cross motions for summary **[**772]** judgment, and adopted by the judge as the basis for his decision. [2] In sum, Parker qualified for benefits under *G. L. c. 32B*, which the town had adopted. For many years she chose not to apply for the benefits, **[***3]** as she had insurance coverage by virtue of simultaneous employment by another municipality. In early 2004 she notified the town selectmen that she wished to enroll in the town's *G. L. c. 32B* plan as of July 1, 2004. In meetings following the request, the selectmen discussed the high cost of insurance and determined to end Parker's employment at the close of the fiscal year, transferring the functions of her position to the police department. Parker's employment ended and she commenced **[*237]** this action. In his decision, the judge first concluded, contrary to the town's contention at the hearing on summary judgment, [3] that Parker enjoyed a private right of action, although *G. L. c. 32B* does not expressly confer such a right. He then concluded that Parker's termination was neither a violation of c. 32B nor against public policy. We agree.

2 The joint stipulation stated that Parker's employment was terminated and, in somewhat contradictory fashion, also stated that the position was both "eliminate[d]" and "move[d] . . . to the Police Department." Parker's complaint indicates that a police sergeant was in fact appointed to the position. In its brief on appeal, and in oral argument, the town argued that rather than terminating Parker from her position, the town had simply declined to renew her appointment, an argument not made below. For purposes of this appeal, we consider the case as it was argued and decided

below, noting only that the result would be no different if we were to consider that Parker was not reappointed and that someone already receiving the health benefit in another capacity was appointed in her stead.

[*4]**

3 The town does not argue that the judge's ruling was in error in this regard.

1. *Private right of action.* Inquiry into whether a statute provides for a private right of action usually begins with consideration of whether the plaintiff "is one of the class for whose benefit the statute was enacted, or to put it otherwise, whether the statute creates a right in favor of the plaintiff distinct from the public at large." *All Brands Container Recovery, Inc. v. Merrimack Valley Distrib. Co., 54 Mass. App. Ct. 297, 300, 764 N.E.2d 931 (2002).* There is generally a reluctance "to infer a private cause of action from a statute in the absence of some indication from the Legislature supporting such an inference," *Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 544, 689 N.E.2d 799 (1998)*, especially where the statute expressly provides particular remedies for its violation, *id. at 547.* However where, as here, a statutory right is given to a certain class of individuals, and not to the public at large, and the statute provides no remedy for enforcement of that right, **[***5]** "the right may be asserted by any appropriate common law remedy that is available," so that the statutory right will not prove illusory. *Gabriel v. Borowy, 324 Mass. 231, 234, 85 N.E.2d 435 (1949).* See *Ludlow Educ. Assn. v. Ludlow, 31 Mass. App. Ct. 110, 120, 644 N.E.2d 227 (1991).*

2. *Violation of G. L. c. 32B.* We also agree with the judge, however, that the statute does not give rise to Parker's claimed right to employment. The statute, while providing insurance benefits for those employed by the town, does not work to protect their employment status, and thus does not provide an avenue for Parker to raise a claim of wrongful termination.

The town argues, and the judge ruled, that Parker was an at-will employee, and that her application for benefits under *G. L. c. 32B* did not convert her status to **[**773]** an employee with guaranteed permanent employment. Parker argues that once adopted by the municipality, the statute prohibits the town from terminating her **[*238]** employment solely to avoid paying the expense of her health insurance.

While *G. L. c. 32B* provides a private right of action with respect to its subject matter, mere eligibility for the insurance does not in any way **[***6]** protect the employment status of a town employee. Elimination of Parker's position, resulting in her employment being terminated, does not implicate the provisions of the statute; the position, and her continued employment, bear no relationship to the purpose of c. 32B, which deals solely with insurance benefits for certain public employees. [4] The statutory language contains no direct or indirect reference to an entitlement to employment. The legislative history makes no reference to such a right resulting from passage of the statute, nor does Parker point to any such right contemplated in the proceedings during which the town adopted the statute pursuant to *c. 32B, § 10*, or in the establishment of the conditions of her employment. To rule that the statute imports the right to convert an at-will position to one of guaranteed employment would encourage every at-will employee to opt for the insurance in order to guarantee continuing employment, thus substantially hampering the town's ability to maintain at-will positions in its work force, a result clearly not contemplated in the statute.

4 *General Laws c. 32B, § 1*, as amended through St. 1982, c. 615, § 3, provides in pertinent part: "The purpose of this chapter is to provide a plan of group life insurance, group accidental death and dismemberment insurance and group general or blanket hospital, surgical, medical, dental and other health insurance for certain persons in the service of counties, except Worcester County, cities, towns and districts and their dependents." *General Laws c. 32B, § 2(d)*, as amended by St. 1958, c. 536, defines an "[e]mployee" as "any person in the service of a governmental unit . . . who receives compensation for such . . . services, whether such person be employed, appointed or elected by popular vote . . . ."

[*7]** This result would be especially contradictory with respect to certain at-will employees, such as town dog officers, who are subject to annual appointment. See *G. L. c. 140, § 151.* [5] Although the parties' stipulation does not identify the origin of **[*239]** or the terms under which Parker was retained as dog officer, [6] under Parker's reading of *G. L. c. 32B*, any employee appointed by the town as dog officer for the term of one year could immediately thwart the town's right and obligation to make an annual appointment merely by opting into the insurance provisions of c. 32B. Such an outcome would fail to attribute to the Legislature "certain commonsense general purposes," *Dedham v. Labor Relations Commn., 365 Mass. 392, 402, 312 N.E.2d 548 (1974)*, that permit a reading of the statutes in a manner "so as to constitute a harmonious whole." *Ibid.*, quoting from *Mathewson v. Contributory Retirement Appeal Bd., 335 Mass. 610, 614, 141 N.E.2d 522 (1957).* Moreover, such an interpretation would not "comport[] with the canons that interpretation should tend to preserve the substance of a statute rather than diminish it, . . . [and] should not override common sense, **[***8]** . . . or produce absurd or unreasonable results." *Sisca v.* **[**774]** *Fall River, 65*

Mass. App. Ct. 266, 272-273, 838 N.E.2d 609 (2005), quoting from *Dillon v. Massachusetts Bay Transp. Authy., 49 Mass. App. Ct. 309, 315-316, 729 N.E.2d 329 (2000)*.

5 *General Laws c. 140, § 151*, as amended by St. 1983, c. 631, § 4, provides in pertinent part: "[T]he board of selectmen of each town shall annually on May first designate one or more dog officers, who may be police officers or constables and who, except as herein provided, shall hold office for one year or until their successors are qualified."

6 See note 1, *supra*.

The cases cited by Parker in support of her position are inapposite. See *Larson v. School Comm. of Plymouth, 430 Mass. 719, 723 N.E.2d 497 (2000)* (no requirement to continue employee benefits under *G. L. c. 32B* after termination for cause); *Ramponi v. Board of Selectmen of Weymouth, 26 Mass. App. Ct. 826, 533 N.E.2d 226 (1989)* (interpreting the definition of "employee" **[***9]** in *G. L. c. 32B*); *McDonald v. Town Manager of Southbridge, 39 Mass. App. Ct. 479, 657 N.E.2d 1285 (1995), S.C., 423 Mass. 1018, 672 N.E.2d 10 (1996)* (eligibility of employee for coverage under c. 32B as a retiree). To adopt Parker's argument would be tantamount to a declaration that once an eligible employee opts into a municipal insurance program offered by virtue of *G. L. c. 32B*, he or she will have achieved lifetime employment, without the strong proof and explicit expressions of intent usually required to show such appointment. See *O'Brien v. Analog Devices, Inc., 34 Mass. App. Ct. 905, 906-907, 606 N.E.2d 937 (1993)* ("a lifetime contract [of employment] is so extraordinary that it takes strong proof . . . and particularly explicit expressions of intent . . . to bind an employer [to such a contract]").

Parker next argues that we should adopt Federal law **[*240]** safeguarding her employment. This argument is also not persuasive. Citing various decisions under the Federal Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C. §§ 1001 et seq. (1999 & Supp. 2006)*, see, e.g., *Fitzgerald v. Codex Corp., 882 F.2d 586, 589 (1st Cir. 1989)*, Parker suggests that the "[t]own's **[***10]** actions here would be a clear violation of ERISA," and that we should adopt the Federal statute as policy with respect to municipal employees. We decline the invitation, especially because, unlike ERISA -- which explicitly provides that it is unlawful to discharge an employee for exercising any right made available under ERISA, see *29 U.S.C. § 1140* -- *G. L. c. 32B* contains no comparable provision.

3. *Public policy considerations.* Lastly, Parker argues that termination of her employment was against public policy, and that she is thus entitled to reinstatement, or at least damages for wrongful termination, even though she is an at-will employee. While this argument strikes closer to the mark, it is ultimately unavailing. Generally, employment that is at-will [7] may be terminated by either side at any time and without reason. See *Gebhard v. Royce Aluminum Corp., 296 F.2d 17, 18 (1st Cir. 1961)* (citing Massachusetts cases); *Mechanics' Foundry & Mach. Co. v. Lynch, 236 Mass. 504, 505, 128 N.E. 877 (1920)*; *Fenton v. Federal St. Bldg. Trust, 310 Mass. 609, 612, 39 N.E.2d 414 (1942)*. Thus, the town had the right to "'terminate[] **[***11]** [the employment] at any time for any reason or for no reason at all,' with limited exceptions, such as public policy considerations." *York v. Zurich Scudder Invs., Inc., 66 Mass. App. Ct. 610, 614, 849 N.E.2d 892 (2006)*, quoting from *Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 668 n.6, 429 N.E.2d 21 (1981)*.

7 Although the parties' stipulation did not characterize Parker's employment as at-will, the judge, without motion for corrected findings, did so; nothing to the contrary appears either in the record or in the parties' materials on appeal, and we consider her employment to be at-will for the purposes of this opinion.

In exceptional cases, for reasons of public policy, an at-will employee may maintain a cause of action and find redress where the termination results from the **[**775]** employee's assertion of some legally guaranteed right, or refusal to engage in illegal or harmful conduct. See *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 149-150, 533 N.E.2d 1368 (1989)* **[***12]** (on public policy grounds, redress permitted for at-will employees terminated **[*241]** "for asserting a legally guaranteed right [e.g., filing [a] workers' compensation claim], for doing what the law requires [e.g., serving on a jury], or for refusing to do that which the law forbids [e.g., committing perjury" or ignoring legally required safety rules]). See also *Flesner v. Technical Communications Corp., 410 Mass. 805, 810-811, 575 N.E.2d 1107 (1991)*, and cases cited therein. Parker argues that she was terminated solely for exercising her legally guaranteed right to obtain insurance, based on the added expense to the town of providing such insurance, and that on public policy grounds, exercise of this legal right cannot provide the basis for her termination. We conclude that the exercise of this legal right should not, as a matter of public policy, provide grounds for a cause of action for redress in the event of termination of an at-will municipal employee, even if it constitutes the sole ground for termination.

In examining the question whether employees' exercise of their rights should affect employment, our cases

have considered the various interests at stake. "Employees have an **[***13]** interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees." *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. at 149*, quoting from *Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71, 417 A.2d 505 (1980)*. As in the private sector, we think that a municipal employer has a legitimate interest in having a large amount of control over its workforce and in exercising wide discretion to adapt to changing circumstances. See *Fortune v. National Cash Register Co., 373 Mass. 96, 102, 364 N.E.2d 1251 (1977)*. Such circumstances may include the burgeoning cost of employee insurance benefits. We think the municipality's interest, and thus that of the taxpayer, in controlling its operations and finances, and in running the town business, permitted the town to consider the financial impact of Parker's request in determining when and whether to alter the description **[***14]** of her at-will position, and to transfer it to another department with the resulting termination of her employment, without fear of having to deal with the prospect of either having **[*242]** her locked into the position on a permanent basis, or providing other consideration as redress.

The public policy exception is narrowly construed; not every statutory right guarantees employment or provides grounds for a claim arising out of termination. For example, in *King v. Driscoll, 418 Mass. 576, 584, 638 N.E.2d 488 (1994), S.C., 424 Mass. 1, 673 N.E.2d 859 (1996)*, the court declined to apply the public policy exception where an at-will employee was terminated for a variety of reasons, including participation in a derivative stockholder suit against the company. The court observed that "the internal administration, policy, functioning, and other matters of an organization cannot be the basis for a public policy exception to the general rule that at-will employees are terminable at any time with or without cause"; "the existence of a statute relating to a particular matter is [not] by itself a **[**776]** pronouncement of public policy that will protect, in every instance, an employee from termination"; **[***15]** and "a public policy, evidenced in a particular statute, which protects employees in some instances, might not protect employees in all instances." *Id. at 583-584*. Compare *Kolodziej v. Smith, 412 Mass. 215, 588 N.E.2d 634 (1992)* (at-will employee discharged for failing to attend mandatory motivational seminar with religious overtones was not protected by Federal and State guarantees of religious freedom; *G. L. c. 12, § 11I*; or *G. L. c. 151B, § 4[1A]*); *Perkins v. Commonwealth, 52 Mass. App. Ct. 175, 179-180, 752 N.E.2d 761 (2001)* ("anti-hazing" statute did not guarantee that police cadet could not be dismissed for inability to withstand training).

Further, we note that in the context of the private sector, financial considerations can provide good cause to terminate an at-will employee. See *Karcz v. Luther Mfg. Co., 338 Mass. 313, 320, 155 N.E.2d 441 (1959)* ("[d]ischarges because of economic conditions on a nondiscriminatory basis must be regarded as for 'just cause'"); *York v. Zurich Scudder Invs., Inc., 66 Mass. App. Ct. at 618* (cost-cutting recognized as "good cause" for terminating an at-will employee). **[***16]**

In *Shea v. Board of Selectmen of Ware, 34 Mass. App. Ct. 333, 615 N.E.2d 196 (1993)*, we considered the case of town employees who, though not entitled as of right to the insurance provided under *G. L. c. 32B*, had nonetheless been voluntarily enrolled by the **[*243]** town in the insurance program. The town later cancelled the employees' insurance coverage. In sustaining the town's action, we noted: "The plaintiffs have failed to suggest any public policy support for their fundamental proposition that, once made eligible for the town's insurance plan, they can never be terminated. Nor can we divine any public interest that would be advanced by sanctioning the fiscal straitjacket with which the plaintiffs seek to restrain their town, especially when the realities of municipal economic stringency and skyrocketing health insurance costs are matters of common knowledge[; it] would require explicit statutory language [to confer such a right]." *Id. at 338*. Parker can point to no legislative or other source of policy, nor can we find one, barring the town from considering the public cost that Parker's continued employment would engender if she were enrolled in the insurance **[***17]** program, or from reassigning her duties to another existing employee in order to avoid those costs. We see no reason to deny the town the same discretion in fiscal matters as exists in the private sector.

Finally, to the extent that Parker's claim imports that the town acted in bad faith, or was in violation of an implied covenant of good faith and fair dealing, that claim must fail as well. See *York v. Zurich Scudder Invs., Inc., 66 Mass. App. Ct. at 615-618* (extensive discussion of concepts of good faith and fair dealing in termination of at-will employment). "[A]n employer is entitled to be motivated by and to serve its own legitimate business interests; [the] employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world; and [the] employer needs flexibility in the face of changing circumstances. We recognize the employer's need for a large amount of control over its work force." *Id. at 617*, quoting from *Fortune v. National Cash Register Co., 373 Mass. at 101-102*. *Judgment affirmed.*

127 S. Ct. 2352, *; 168 L. Ed. 2d 85, **;
2007 U.S. LEXIS 7720, ***; 75 U.S.L.W. 4433

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS v. CITY OF NEW YORK, NEW YORK

No. 06-134

SUPREME COURT OF THE UNITED STATES

127 S. Ct. 2352*; *168 L. Ed. 2d 85*; *2007 U.S. LEXIS 7720*; *75 U.S.L.W. 4433*; *20 Fla. L. Weekly Fed. S 350

April 24, 2007, Argued
June 14, 2007, Decided

NOTICE:

[*1]** The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

City of New York v. Permanent Mission of India to the UN, 446 F.3d 365, 2006 U.S. App. LEXIS 10363 (2d Cir. N.Y., 2006)

DISPOSITION: Affirmed and remanded.

SYLLABUS

Under New York law, real property owned by a foreign government is exempt from taxation when used exclusively for diplomatic offices or quarters for ambassadors or ministers plenipotentiary to the United Nations. For years, respondent (City) has levied property taxes against petitioner foreign governments for that portion of their diplomatic office buildings used to house lower level employees and their families. Petitioners have refused to pay the taxes. By operation of state law, the unpaid taxes converted into tax liens held by the City against the properties. The City filed a state-court suit seeking declaratory judgments **[***2]** to establish the liens' validity, but petitioners removed the cases to federal court, where they argued that they were immune under the Foreign Sovereign Immunities Act of 1976 (FSIA), which is "the sole basis for obtaining jurisdiction over a foreign state in federal court," *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439, 109 S. Ct. 683, 102 L. Ed. 2d 818*. The District Court disagreed, relying on an FSIA exception withdrawing a foreign state's immunity from jurisdiction where "rights in immovable property situated in the United States are in issue." *28 U.S.C. § 1605(a)(4)*. The Second Circuit affirmed, holding that the "immovable property" exception applied, and thus the District Court had jurisdiction over the City's suits.

Held: The FSIA does not immunize a foreign government from a lawsuit to declare the validity of tax liens on property held by the sovereign for the purpose of housing its employees. Pp. 3-8.

(a) Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies. In determining the immovable property exception's scope, the Court begins, as always, with the statute's text. Contrary to **[***3]** petitioners' position, *§ 1605(a)(4)* does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession, or specifically exclude cases in which a lien's validity is at issue. Rather, it focuses more broadly on "rights in" property. At the time of the FSIA's adoption, "lien" was defined as a "charge or security or incumbrance upon property," Black's Law Dictionary 1072, and "incumbrance" was defined as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value," *id.*, at 908. New York law defines "tax lien" in accordance with these general definitions. A lien's practical effects bear out the definitions of liens as interests in property. Because a lien on real property runs with the land and is enforceable against subsequent purchasers, a tax lien inhibits a quintessential property ownership right--the right to convey. It is thus plain that a suit to establish a tax lien's validity implicates "rights in immovable property." Pp. 3-5.

(b) This Court's reading is supported by two of the FSIA's related purposes. First, Congress intended the FSIA to adopt the restrictive theory of sovereign immunity, **[***4]** which recognizes immunity "with regard to sovereign or public acts *(jure imperii)* of a state, but not . . . private acts *(jure gestionis)*." *Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711, 96 S. Ct. 1854, 48 L. Ed. 2d 301*. Property ownership is not an inherently sovereign function. The FSIA was also meant to codify the real property exception recognized by international practice at the time of its enactment. That

practice supports the City's view that petitioners are not immune, as does the contemporaneous restatement of foreign relations law. The Vienna Convention on Diplomatic Relations, on which both parties rely, does not unambiguously support either party, and, in any event, does nothing to deter this Court from its interpretation. Pp. 5-8.

446 F.3d 365, affirmed and remanded.

COUNSEL: John J.P. Howley argued the cause for petitioners.

Sri Srinivasan argued the cause for the United States, as amicus curiae, by special leave of court.

Michael A. Cardozo argued the cause for respondent.

JUDGES: THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined.

OPINION BY: THOMAS

OPINION

[89]** **[*2354]** JUSTICE THOMAS delivered the opinion of the Court.

The Foreign Sovereign Immunities Act of 1976 (FSIA), *28 U.S.C. § 1602* **[***5]** *et seq.*, governs federal courts' jurisdiction in lawsuits against foreign sovereigns. Today, we must decide whether the FSIA provides immunity to a foreign sovereign from a lawsuit to declare the validity of tax liens on property held by the sovereign for the purpose of housing its employees. We hold that the FSIA does not immunize a foreign sovereign from such a suit.

I

The Permanent Mission of India to the United Nations is located in a 26-floor building in New York City that is owned by the Government of India. Several floors are used for diplomatic offices, but approximately 20 floors contain residential units for diplomatic employees of the mission and their families. The employees--all of whom are below the rank of Head of Mission or Ambassador--are Indian citizens who receive housing from the mission rent free.

Similarly, the Ministry for Foreign Affairs of the People's Republic of Mongolia is housed in a six-story building in New York City that is owned by the Mongolian Government. Like the Permanent Mission of India, certain floors of the Ministry Building include residences for lower level employees of the Ministry and their families.

Under New York law, real property **[***6]** owned by a foreign government is exempt from taxation if it is "used exclusively" for diplomatic offices or for the quarters of a diplomat "with the rank of ambassador or minister plenipotentiary" to the United Nations. *N. Y. Real Prop. Tax Law Ann. § 418* (West 2000). **[*2355]** But "[i]f a portion only of any lot or building . . . is used exclusively for the purposes herein described, then such portion only shall be exempt and the remainder shall be subject to taxation . . . ." *Ibid.*

For several years, the City of New York (City) has levied property taxes against petitioners for the portions of their buildings used to house lower level employees. Petitioners, however, refused to pay the taxes. By operation of New York law, the unpaid taxes eventually converted into tax liens held by the City against the two properties. As of February 1, 2003, the Indian Mission owed about $ 16.4 million **[**90]** in unpaid property taxes and interest, and the Mongolian Ministry owed about $ 2.1 million.

On April 2, 2003, the City filed complaints in state court seeking declaratory judgments to establish the validity of the tax liens. [1] Petitioners removed their cases to federal court, pursuant to *28 U.S.C. § 1441(d)*, **[***7]** which provides for removal by a foreign state or its instrumentality. Once there, petitioners argued that they were immune from the suits under the FSIA's general rule of immunity for foreign governments. *§ 1604*. The District Court disagreed, relying on the FSIA's "immovable property" exception, which provides that a foreign state shall not be immune from jurisdiction in any case in which "rights in immovable property situated in the United States are in issue." *§ 1605(a)(4)*.

1 The City concedes that even if a court of competent jurisdiction declares the liens valid, petitioners are immune from foreclosure proceedings. See Brief for Respondent 40 (noting that there is no FSIA immunity exception for enforcement actions). The City claims, however, that the declarations of validity are necessary for three reasons. First, once a court has declared property tax liens valid, foreign sovereigns traditionally concede and pay. Second, if the foreign sovereign fails to pay in the face of a valid court judgment, that country's foreign aid may be reduced by the United States by 110% of the outstanding debt. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, § 543(a), 119 Stat. 2214 (hereinafter Foreign Operations); Consolidated Appropriations Act of 2005, § 543(a), 118 Stat. 3011 (hereinafter Con-

solidated Appropriations). Third, the liens would be enforceable against subsequent purchasers. 5 *Restatement of Property § 540* (1944).

[*8]** Reviewing the District Court's decision under the collateral order doctrine, a unanimous panel of the Court of Appeals for the Second Circuit affirmed. *446 F.3d 365 (2006)*. The Court of Appeals held that the text and purpose of the FSIA's immovable property exception confirmed that petitioners' personal property tax obligations involved "rights in immovable property." It therefore held that the District Court had jurisdiction to consider the City's suits. We granted certiorari, *549 U.S. , 127 S. Ct. 1144, 166 L. Ed. 2d 910 (2007)*, and now affirm.

II

"[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)*. Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies. *§ 1604*; *Saudi Arabia v. Nelson, 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)*. At issue here is the scope of the exception where "rights in immovable property situated in the United States are in issue." *§ 1605(a)(4)*. Petitioners contend that the language "rights in immovable property" limits the reach of the exception to actions contesting ownership **[***9]** or possession. The City argues that the exception encompasses additional rights in immovable property, **[*2356]** including tax liens. Each party claims international practice at the time of the FSIA's adoption supports its view. We agree with the City.

A

We begin, as always, with the text of the statute. *Limtiaco v. Camacho, 549 U.S. , , 127 S. Ct. 1413, 1418, 167 L. Ed. 2d 212 (2007)*. The FSIA provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in **[**91]** any case . . . in which . . . rights in immovable property situated in the United States are in issue." *28 U.S.C. § 1605(a)(4)*. Contrary to petitioners' position, *§ 1605(a)(4)* does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession. Neither does it specifically exclude cases in which the validity of a lien is at issue. Rather, the exception focuses more broadly on "rights in" property. Accordingly, we must determine whether an action seeking a declaration of the validity of a tax lien places "rights in immovable property . . . in issue."

At the time of the FSIA's adoption in 1976, a "lien" was defined as "[a] **[***10]** charge or security or incumbrance upon property." Black's Law Dictionary 1072 (4th ed. 1951). "Incumbrance," in turn, was defined as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value . . . ." *Id.*, at 908; see also *id.*, at 941 (8th ed. 2004) (defining "lien" as a "legal right or interest that a creditor has in another's property"). New York law defines "tax lien" in accordance with these general definitions. See *N. Y. Real Prop. Tax Law Ann. § 102(21)* (West Supp. 2007) ("'Tax lien' means an unpaid tax . . . which is an encumbrance of real property . . . "). This Court, interpreting the Bankruptcy Code, has also recognized that a lienholder has a property interest, albeit a "nonpossessory" interest. *United States v. Security Industrial Bank, 459 U.S. 70, 76, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982)*.

The practical effects of a lien bear out these definitions of liens as interests in property. A lien on real property runs with the land and is enforceable against subsequent purchasers. See 5 *Restatement of Property § 540* (1944). As such, "a lien has an immediate adverse effect upon the amount which [could be] receive[d] on a sale, . . . **[***11]** constitut[ing] a direct interference with the property . . . ." *Republic of Argentina v. New York, 25 N. Y. 2d 252, 262, 250 N.E.2d 698, 702, 303 N.Y.S.2d 644 (1969)*. A tax lien thus inhibits one of the quintessential rights of property ownership--the right to convey. It is therefore plain that a suit to establish the validity of a lien implicates "rights in immovable property."

B

Our reading of the text is supported by two well-recognized and related purposes of the FSIA: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment. Until the middle of the last century, the United States followed "the classical or virtually absolute theory of sovereign immunity," under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952) (Tate Letter), reprinted in 26 Dept. of State Bull. 984 (1952), and in *Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711, 712, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976)* (App. 2 to opinion of the Court). **[***12]** The Tate Letter announced the United States' decision to join the majority of other countries by adopting the "restrictive **[*2357]** theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts *(jure imperii)* of a state, but not with respect to private acts *(jure gestionis)*." *Id., at 711, 96 S. Ct. 1854, 48 L. Ed. 2d 301*. In enacting the FSIA, Congress intended to codify **[**92]** the restrictive theory's limitation of immunity to sovereign acts. *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394*

(1992); *Asociacion de Reclamantes v. United Mexican States, 237 U.S. App. D.C. 81, 735 F.2d 1517, 1520 (CADC 1984)* (Scalia, J.).

As a threshold matter, property ownership is not an inherently sovereign function. See *Schooner Exchange v. M'Faddon, 7 Cranch 116, 145, 11 U.S. 116, 3 L. Ed. 287 (1812)* ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction, he may be considered as so far laying down the prince, and assuming the character of a private individual"). In addition, the FSIA was also meant "to codify . . . the pre-existing real property **[***13]** exception to sovereign immunity recognized by international practice." *Reclamantes, supra, at 1521 (Scalia, J.)*. Therefore, it is useful to note that international practice at the time of the FSIA's enactment also supports the City's view that these sovereigns are not immune. The most recent restatement of foreign relations law at the time of the FSIA's enactment states that a foreign sovereign's immunity does not extend to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction." Restatement (Second) of Foreign Relations Law of the United States § 68(b), p. 205 (1965). As stated above, because an action seeking the declaration of the validity of a tax lien on property is a suit to establish an interest in such property, such an action would be allowed under this rule.

Petitioners respond to this conclusion by citing the second sentence of Comment *d* to § 68, which states that the rule "does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession. **[***14]** " *Id.*, at 207. According to petitioners, that sentence limits the exception to cases contesting ownership or possession. When read in context, however, the comment supports the City. Petitioners ignore the first sentence of the comment, which reemphasizes that immunity does not extend to cases involving the possession of or "interest in" the property. *Ibid.* And the illustrations following the comment make clear that it refers only to claims incidental to property ownership, such as actions involving an "injury suffered in a fall" on the property, for which immunity would apply. *Id.*, at 208. By contrast, for an eminent-domain proceeding, the foreign sovereign could not claim immunity. *Ibid.* Like the eminent-domain proceeding, the City's lawsuits here directly implicate rights in property.

In addition, both parties rely on various international agreements, primarily the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, [1972] 23 U.S. T. 3227, T. I. A. S. No. 7502, to identify pre-FSIA international practice. Petitioners point to the Vienna Convention's analogous withholding of immunity for "a real action relating to private immovable property situated **[***15]** in the territory of the receiving State, unless [the diplomatic agent] holds it on behalf of the sending State for the purposes of the mission." *Id.*, at 3240, Art. 31(1)(a). Petitioners contend that this language indicates they are entitled to immunity for two reasons. First, petitioners argue that "real action[s]" do **[**93]** not include actions for performance of obligations **[*2358]** "'deriving from ownership or possession of immovable property.'" Brief for Petitioners 28 (quoting E. Denza, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations 238 (2d ed. 1998); emphasis deleted). Second, petitioners assert that the property here is held "'on behalf of the sending State for purposes of the Mission.'" Brief for Petitioners 28.

But as the City shows, it is far from apparent that the term "real action"--a term derived from the civil law--is as limited as petitioners suggest. See *Chateau Lafayette Apartments, Inc. v. Meadow Brook Nat. Bank, 416 F.2d 301, 304, n. 7 (CA5 1969)*. Moreover, the exception for property held "on behalf of the sending State" concerns only the case--not at issue here--where local law requires an agent to hold in **[***16]** his own name property used for the purposes of a mission. 1957 Y. B. Int'l L. Comm'n 94-95 (402d Meeting, May 22, 1957); see also *Deputy Registrar Case*, 94 I. L. R. 308, 313 (D. Ct. The Hague 1980). Other tribunals construing Article 31 have also held that it does not extend immunity to staff housing. See *id.*, at 312; cf. *Intpro Properties (U. K.) Ltd.* v. *Sauvel*, [1983] 1 Q. B. 1019, 1032-1033.

In sum, the Vienna Convention does not unambiguously support either party on the jurisdictional question. [2] In any event, nothing in the Vienna Convention deters us from our interpretation of the FSIA. Under the language of the FSIA's exception for immovable property, petitioners are not immune from the City's suits.

2 The City offers several other arguments against immunity based on the Vienna Convention, but those arguments ultimately go to the merits of the case, *i.e.*, whether petitioners are actually responsible for paying the taxes. Because the only question before us is one of jurisdiction, and because the text and historical context of the FSIA demonstrate that petitioners are not immune from the City's suits, we leave these merits-related arguments to the lower courts.

[*17]** III

Because the statutory text and the acknowledged purposes of the FSIA make it clear that a suit to establish the validity of a tax lien places "rights in immovable property . . . in issue," we affirm the judgment of the

Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: STEVENS

DISSENT

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

Diplomatic channels provide the normal method of resolving disputes between local governmental entities and foreign sovereigns. See *Schooner Exchange v. M'Faddon, 7 Cranch 116, 146, 11 U.S. 116, 3 L. Ed. 287 (1812)*. Following well-established international practice, American courts throughout our history have consistently endorsed the general rule that foreign sovereigns enjoy immunity from suit in our courts. See *Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983)*; *Nevada v. Hall, 440 U.S. 410, 417, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979)*. The fact that the immunity is the product of comity concerns rather than a want of juridical power, see *Verlinden B. V., 461 U.S., at 486,* **[**94]** *103 S. Ct. 1962, 76 L. Ed. 2d 81*, does not detract from the important role that it performs in ordering **[***18]** our affairs.

The Foreign Sovereign Immunities Act of 1976 (FSIA) both codified and modified that basic rule. The statute confirms that sovereigns are generally immune from suit in our courts, *28 U.S.C. § 1604*, but identifies seven specific exceptions through which courts may accept jurisdiction, *§ 1605(a)*. None of those exceptions pertains, or indeed makes any reference, to actions brought to establish a foreign sovereign's **[*2359]** tax liabilities. Because this is such an action, I think it is barred by the general rule codified in the FSIA.

It is true that the FSIA contains an exception for suits to resolve disputes over "rights in immovable property," *§ 1605(a)(4)*, and New York City law provides that unpaid real estate taxes create a lien that constitutes an interest in such property, N. Y. C. Admin. Code *§ 11-301* (Cum. Supp. 2006). It follows that a literal application of the FSIA's text provides a basis for applying the exception to this case. See *ante*, at 4-5. Given the breadth and vintage of the background general rule, however, it seems to me highly unlikely that the drafters of the FSIA intended to abrogate sovereign immunity in suits over property **[***19]** interests whose primary function is to provide a remedy against delinquent taxpayers.

Under the majority's logic, since "a suit to establish the validity of a lien implicates 'rights in immovable property,'" *ante*, at 5, whenever state or municipal law recognizes a lien against a foreign sovereign's real property, the foreign government may be haled into federal court to litigate the validity of that lien. Such a broad exception to sovereign immunity threatens, as they say, to swallow the rule. Under the municipal law of New York City, for example, liens are available against real property, among other things, to compel landowners to pay for pest control, emergency repairs, and sidewalk upkeep. See N. Y. C. Admin. Code *§§ 17-145, 17-147, 17-151(b)* (2000); see also M. Mitzner, Liens and Encumbrances, in Real Estate Titles 299, 311-314 (J. Pedowitz ed. 1984). A whole host of routine civil controversies, from sidewalk slip-and-falls to landlord-tenant disputes, could be converted into property liens under local law, and then used--as the tax lien was in this case--to pierce a foreign sovereign's traditional and statutory immunity. In order to reclaim immunity, foreign governments **[***20]** might argue in those cases--just as the Governments of India and the People's Republic of Mongolia tried to argue here--that slip-and-fall claims, even once they are transformed into property liens, do not implicate "rights in immovable property." But the burden of answering such complaints and making such arguments is itself an imposition that foreign sovereigns should not have to bear.

The force of the arguments of the Solicitor General as *amicus curiae* supporting petitioners buttresses my conviction that a narrow reading of the statutory exception is more faithful to congressional intent than a reading that enables a dispute over taxes to be classified as a dispute over "rights in immovable property." It is true that insofar as the FSIA transferred the responsibility for making immunity decisions from the State Department to the Judiciary, *Verlinden* **[**95]** *B. V., 461 U.S., at 487-488, 103 S. Ct. 1962, 76 L. Ed. 2d 81*, the views of the Executive are not entitled to any special deference on this issue. But we have recognized that well-reasoned opinions of the Executive Branch about matters within its expertise may have the "power to persuade, if lacking power to control." *Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*.

[*21]** And I am persuaded. At bottom, this case is not about the validity of the city's title to immovable property, or even the validity of its automatic prejudgment lien. Rather, it is a dispute over a foreign sovereign's tax liability. If Congress had intended the statute to waive sovereign immunity in tax litigation, I think it would have said so.

Accordingly, I respectfully dissent.

69 Mass. App. Ct. 393, *; 868 N.E.2d 624, **;
2007 Mass. App. LEXIS 702, ***

ANTHONY T. POLITO vs. SCHOOL COMMITTEE OF PEABODY.

No. 06-P-606

APPEALS COURT OF MASSACHUSETTS

69 Mass. App. Ct. 393; 868 N.E.2d 624; 2007 Mass. App. LEXIS 702

January 8, 2007, Argued
June 22, 2007, Decided

SUBSEQUENT HISTORY: As Corrected July 18, 2007

PRIOR HISTORY: [*1]**
Essex. Civil action commenced in the Superior Court Department on April 19, 2005. The case was heard by Richard E. Welch, III, J., on motions for summary judgment.

DISPOSITION: Judgment of the Superior Court is affirmed.

COUNSEL: Daniel B. Kulak for the defendant.

James F. Lamond for the plaintiff.

JUDGES: Present: Kantrowitz, Trainor, Katzmann, JJ.

OPINION BY: TRAINOR

OPINION

[625]** **[*393]** TRAINOR, J. The school committee of Peabody (committee) appeals from a summary judgment declaring that the plaintiff, Anthony T. Polito, is entitled to arbitrate whether good cause existed to terminate his services as an assistant superintendent of the Peabody school system.

Facts. Polito was hired in June, 2004, as an assistant superintendent of schools in Peabody pursuant to a written agreement (agreement). The agreement was drafted by the committee and provided that his employment commenced on July 1, 2004, and continued until June 30, 2007, a three-year term. Paragraph 4 of the agreement, entitled "Discharge," states:

> **[*394]** "During the term of this Agreement, [Polito] shall be subject to discharge for good cause and shall be entitled to notice and procedural safeguards provided school principals under *G. L. c. 71, § 41*, including the right to file for arbitration as provided therein. In the event such a filing **[***2]** for arbitration occurs, the parties agree that the arbitration process shall be governed by said *G. L. c. 71, § 41*, excepting that the arbitrator's remedial authority shall be limited to an award of back pay damages for the balance of the contract term after the discharge and shall not include authority to reinstate [Polito]."

The committee terminated Polito's employment in late 2004. He attempted to invoke the arbitration term contained in the agreement in order to arbitrate whether he had been terminated for "good cause." He wrote to the commissioner of the Department of Education (commissioner), as instructed by *G. L. c. 71, § 41* (sometimes referred to as the statute), asking him for a list of arbitrators. In a letter dated December 15, 2004, the commissioner declined to do so. The commissioner reasoned that Polito did not qualify for statutory arbitration under *G. L. c. 71, §§ 41* or *42*, which provide that various supervisors, such as principals and assistant **[**626]** principals, who have been in their positions for three consecutive years cannot be dismissed or demoted except for good cause, and are entitled to arbitrate dismissal or demotion decisions. The commissioner declined to address **[***3]** whether the position of assistant superintendent was covered by the statute, finding that because Polito had not been in his position for three consecutive years at the time of his termination, he was not eligible for arbitration under the statute.

Prior to signing the agreement, there was no discussion between Polito and the committee about what would happen if the commissioner declined to provide a list of arbitrators. After the commissioner's letter, Polito invited the committee to enter into a process to jointly select an arbitrator to hear the dispute. The committee declined that invitation.

Discussion. The parties agree that this dispute is appropriate for resolution by summary judgment. [1] There are no genuine issues of material fact.

1 Summary judgment is appropriate where there are no genuine issues of material fact and where the moving party is entitled to judgment as matter of law. *Mass.R.Civ.P. 56(c)*, as amended, 436 Mass. 1404 (2002). *Cassesso v. Commissioner of Correction, 390 Mass. 419, 422, 456 N.E.2d 1123 (1983)*. The moving party bears the burden of demonstrating the absence of a triable issue. *Pederson v. Time, Inc., 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989)*. The evidence must be viewed in the light **[***4]** most favorable to the nonmoving party. *Riley v. Presnell, 409 Mass. 239, 240-241, 565 N.E.2d 780 (1991)*.

[*395] The dispute between the parties concerns the interpretation of the "Discharge" provision in the agreement and its relationship to *G. L. c. 71, § 41*. [2]

2 *General Laws c. 71, § 41*, as amended by St. 1994, c. 346, provides in pertinent part:

> "A principal, assistant principal, department head or other supervisor who has served in that position in the public schools of the district for three consecutive years shall not be dismissed or demoted except for good cause. . . . A principal, assistant principal, department head or other supervisor shall not be dismissed unless he has been furnished with a written notice of intent to dismiss with an explanation of the grounds for the dismissal, and, if he so requests, has been given a reasonable opportunity within fifteen days after receiving such notice to review the decision with the superintendent . . . . A principal, assistant principal, department head or other supervisor may seek review of a dismissal or demotion decision by filing a petition with the commissioner for arbitration. . . . The commissioner shall provide the parties with the names of three arbitrators **[***5]** who are members of the American Arbitration Association."

Polito argues that the "good cause" protection and the right to arbitrate that protection under the agreement was intended to apply from the first day of the employment period. He also argues that the reference to *G. L. c. 71, § 41*, was intended to incorporate only its procedural and not its substantive provisions. The committee argues, on the other hand, that by referencing *G. L. c. 71, § 41*, the parties intended to incorporate both its procedural and substantive provisions. Specifically, the committee maintains that Polito should receive the same procedural and substantive rights offered to school principals under the statute. Polito, according to this argument, would only be entitled to "good cause" protection and the right to arbitrate that protection after three consecutive years of employment in the position of assistant superintendent. Finally, the committee argues that allowing arbitration of Polito's termination would be contrary to public policy, as established by the Education Reform Act of 1993, St. 1993, c. 71, and therefore unenforceable.

[*396] 1. *Disputed contract provision.* "We must interpret the words in a **[**627]** contract **[***6]** according to their plain meaning." *Dickson v. Riverside Iron Works, Inc., 6 Mass. App. Ct. 53, 55, 372 N.E.2d 1302 (1978)*. We are also required to determine the objective intent of the parties in making the contract. *Ibid.* In addition, "[w]e must put ourselves in the place of the parties to the instrument and give its words their plain and ordinary meaning in the light of the circumstances and in view of the subject matter." *deFreitas v. Cote, 342 Mass. 474, 477, 174 N.E.2d 371 (1961)*, quoting from *McQuade v. Springfield Safe Deposit & Trust Co., 333 Mass. 229, 233, 129 N.E.2d 923 (1955)*. We apply general principles of contract law to determine whether the agreement calls for arbitration. *Mugnano-Bornstein v. Crowell, 42 Mass. App. Ct. 347, 350, 677 N.E.2d 242 (1997)*. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed . . . to submit." *Ibid.*, quoting from *Local 285, Serv. Employees Intl. Union, AFL-CIO v. Nonotuck Resource Assocs., Inc., 64 F.3d 735, 738 (1st Cir. 1995)*.

The "Discharge" provision provides: "*During the term of this Agreement*, [Polito] shall be subject to discharge for good cause and shall be entitled to notice and procedural safeguards provided school principals under *G. L. c. 71, § 41*, including **[***7]** the right to file for arbitration as provided therein" (emphasis added). The plain meaning of this provision is that Polito could be discharged only for "good cause" and would have the right to arbitrate the determination of "good cause" from the first day to the last day of the contract term. If we were to construe the "Discharge" provision as providing Polito "good cause" protection and enforcement by arbitration only after he had served three consecutive years in the position, it would render meaningless the phrase, "[d]uring the term of this Agreement." "A contract should be construed in such a way that no word or phrase is made meaningless by interpreting another word or phrase, because the interpretation should favor a valid

and enforceable contract . . . rather than one of no force and effect." *Lexington Ins. Co. v. All Regions Chem. Labs, Inc., 419 Mass. 712, 713, 647 N.E.2d 399 (1995).* Rendering that phrase meaningless would in turn render the entire provision meaningless, which could hardly have been the intent of the parties.

The committee argues that the parties intended that Polito be **[*397]** afforded the same rights afforded to school principals under *G. L. c. 71, § 41*, but this interpretation **[***8]** is not consistent with the language of the "Discharge" provision. Significantly, under the statute, the remedy for a determination that a termination has occurred without "good cause" is reinstatement. Here, the "Discharge" provision specifically removes that power from the arbitrator and allows him only to award money damages, to the extent of unpaid salary. This language clearly evidences an intention of the parties, and particularly the committee as the drafter, to incorporate only certain aspects of *G. L. c. 71, § 41*, while specifically rejecting others.

The "Discharge" provision directs that the arbitration process shall be governed by *G. L. c. 71, § 41*. The statute provides that "[t]he commissioner shall provide the parties with the names of three arbitrators who are members of the American Arbitration Association." The commissioner refused to provide the list of arbitrators because he believed that Polito was not entitled to arbitration under the statute. The commissioner's belief, however, does not excuse the committee's obligation to arbitrate Polito's claim. Polito's right to arbitration is grounded in the agreement, not in the statute. "Where the parties to a contract have **[***9]** not agreed with **[**628]** respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances will be supplied by the court." *Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Authy., 7 Mass. App. Ct. 336, 342, 387 N.E.2d 206 (1979)*. The parties need only directly request the American Arbitration Association to provide a list of member arbitrators and to jointly choose an arbitrator from that list. This method of choosing an arbitrator is not inconsistent with the terms of the agreement, and by resolving this unanticipated procedural gap, the substantive rights of the parties are not adversely affected. [3]

> 3 When during the term of a contract, events occur that the parties did not anticipate, we may "supply[] a term omitted from the . . . actual contract" in order to effectuate the parties' contractual intent. *Newfield House, Inc. v. Massachusetts Dept. of Pub. Welfare, 651 F.2d 32, 36 (1st Cir.)*, cert. denied, *454 U.S. 1114, 102 S. Ct. 690, 70 L. Ed. 2d 653 (1981)*.

2. *Public policy.* The committee argues that it is against public policy, specifically the Education Reform Act of 1993, to **[*398]** enforce an employment contract that provides an assistant superintendent the right to be discharged **[***10]** only for "good cause" from the first day of his term of employment. The committee relies on *Downing v. Lowell, 50 Mass. App. Ct. 779, 741 N.E.2d 469 (2001)*, and *Christensen v. Kingston Sch. Comm., 360 F. Supp. 2d 212 (D. Mass. 2005)*, neither of which are analogous to the issues before us. *Downing v. Lowell, supra at 782-784*, involved the rights of a tenured principal under *G. L. c. 71, § 41*, while *Christensen v. Kingston Sch. Comm., supra at 216-219*, involved a principal who was not tenured. Although the principals in both cases had an employment contract, they were also subject to the procedural and substantive jurisdiction of *G. L. c. 71, § 41*. Here, Polito's rights are grounded entirely in his agreement and not in the statute.

The committee erroneously conflates the "good cause" protection granted to Polito with that granted to principals under the statute. Under *G. L. c. 71, § 41*, a principal terminated without "good cause," as determined by the arbitrator, can be reinstated into his position. Polito, on the other hand, can be awarded nothing more than money damages, to the extent of unpaid salary.

The Education Reform Act of 1993 legislated that principals could only attain a limited form of tenure **[***11]** after being employed for three consecutive years. After this initial three-year period, "good cause" protection would allow them to be reinstated to their position for the balance of their then current contract. The "Discharge" provision in the agreement, and specifically Polito's right to arbitration, with its limited remedy, has nothing to do with the public policy concerning tenure contained in the Education Reform Act of 1993. See *Flynn v. Boston, 59 Mass. App. Ct. 490, 493-494, 796 N.E.2d 881 (2003)*.

Conclusion. We have determined that the meaning of the agreement's "Discharge" provision was to provide Polito with the right to be terminated only for "good cause"; that he had the right, by reference, to notice and other procedural safeguards provided principals under *G. L. c. 71, § 41*; and that he had the right to arbitrate the determination of "good cause" during the entire contractual term. The remedy under such an arbitration is limited to an award of money damages if no "good cause" is found. The parties can jointly choose an appropriate arbitrator **[*399]** to hear this dispute. The terms of Polito's employment contract are not contrary **[**629]** to the public policy embodied in the Education Reform Act of 1993. **[***12]** The judgment of the Superior Court is affirmed.

So ordered.

SCHOOL COMMITTEE OF HULL vs. HULL TEACHERS ASSOCIATION, MTA/NEA.

No. 06-P-949

APPEALS COURT OF MASSACHUSETTS

69 Mass. App. Ct. 860; 2007 Mass. App. LEXIS 939

March 9, 2007, Argued
August 27, 2007, Decided

PRIOR HISTORY: [*1]

Plymouth. Civil action commenced in the Superior Court Department on November 16, 2004. The case was heard by Suzanne V. DelVecchio, J.

DISPOSITION: Judgment affirmed.

COUNSEL: James A. Toomey for the plaintiff.

Americo A. Salini, Jr., for the defendant.

JUDGES: Present: Perretta, Brown, & Cypher, JJ.

OPINION BY: CYPHER

OPINION

CYPHER, J. The school committee of Hull (committee) appeals from a judgment of the Superior Court affirming an arbitrator's award. The arbitrator concluded that the committee had violated the collective bargaining agreement (CBA) by failing to comply with certain requirements for the evaluation of Alice Haseltine, a teacher who had not attained professional teacher status. [1] The committee argues that the Education Reform Act of 1993 (Act) made substantial changes in school committee governance and that, as a result, Haseltine's grievance was not arbitrable because it involved a decision not to renew the employment of a teacher who had not attained professional teacher status. [2] The committee goes on to argue that because Haseltine lacked such status, she should be treated as an at-will employee. We affirm.

1 The Education Reform Act of 1993, St. 1993, c. 71, § 43, "replaced the concept of 'tenure' with 'professional **[*2]** teacher status.'" *Lyons v. School Comm. of Dedham, 440 Mass. 74, 76 n.3, 794 N.E.2d 586 (2003).*

2 The Act, which contains some 105 provisions, significantly altered the management of public schools. See generally *School Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 759-760, 784 N.E.2d 11 (2003).*

Background. Alice Haseltine had been employed full time by the committee since 2001. She divided her time forty per cent as a technology instructor and sixty per cent as a guidance counsellor at Hull High School. On May 30, 2003, she was called to the office of the principal, Dr. Russell Goyette, and given a letter which stated: "Pursuant to . . . *General Laws, Chapter 71, Section 41*, I am sorry to inform you that we will not be renewing your contract for the 2003-2004 school year." No reason was given. The Hull Teachers Association (association) filed a grievance on Haseltine's behalf. When that procedure did not resolve the grievance, the association sought arbitration of the grievance. The stipulated issues presented to the arbitrator were: "Did the School Committee violate Article VI, Sections 6, 7, 8, 10, 11, 12 and Article XLIII of the Association's collective bargaining agreement in the manner **[*3]** in which it evaluated the Grievant prior to the decision not to reappoint her for the 2003-04 school year? If so, what shall be the remedy?"

The arbitrator concluded that the committee had failed to comply with certain requirements for the evaluation of Haseltine, as stated in the parties' CBA. In the award, the arbitrator ordered that Haseltine be reinstated to her position. The committee sought to vacate the arbitrator's award in the Superior Court. *G. L. c. 150C, § 11.* The association sought an order confirming the award. *G. L. c. 150C, § 10.*

A judge concluded that the arbitrator did not exceed his authority, denied the committee's request to vacate the award, and allowed the association's motion to confirm the award.

Discussion. We proceed under familiar principles governing judicial review of decisions of arbitrators. See *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990)* (courts inquire into arbitration only to determine if arbitrator has exceeded scope of authority or decided the

matter based on fraud, arbitrary conduct, or procedural irregularity in hearings).

We first examine the statutory framework established by the Act, applicable to this case, **[*4]** to determine if the arbitrator correctly determined that the scope of his authority in considering the grievance was not limited by the Act. Such a determination belongs with the courts. Cf. *School Dist. of Beverly v. Geller, 435 Mass. 223, 230, 755 N.E.2d 1241 (2001)* (responsibility for interpreting statute and arbitrator's authority thereunder remains with court).

The committee relies on a provision in *G. L. c. 71, § 42*, that teachers without professional teacher status "shall otherwise be deemed employees at will." [3] The committee asserts that at-will employees may be dismissed at any time, for any reason or no reason. The committee's argument ignores the requirements of the preceding sentences in *c. 71, § 42*. The statute makes clear that after the initial ninety days of service a teacher without professional teacher status must be given a written notice of intent to dismiss, along with an explanation of the grounds for dismissal. See and compare *Saxonis v. Lynn, 62 Mass. App. Ct. 916, 917, 817 N.E.2d 793 (2004)*, cert. denied, *546 U.S. 819, 126 S. Ct. 350, 163 L. Ed. 2d 59 (2005)* ("rudimentary rights to notice and a hearing prior to dismissal" accrue under *c. 71, § 42*, after retention for ninety days).

> 3 *General Laws c. 71, § 42*, second par., inserted **[*5]** by St. 1993, c. 71, § 44, states: "A teacher who has been teaching in a school system for at least ninety calendar days shall not be dismissed unless he has been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail to permit the teacher to respond and documents relating to the grounds for dismissal, and, if he so requests, has been given a reasonable opportunity within ten school days after receiving such written notice to review the decision with the principal . . . , and to present information pertaining to the basis for the decision and to the teacher's status. . . . Teachers without professional teacher status shall otherwise be deemed employees at will."

Section 42 was rewritten by St. 1993, c. 71, § 44. The version of the statute in effect prior to 1993 provided that a teacher "not employed at discretion" who had served for more than ninety days could not be dismissed without prior notice and, if requested, a written statement of "cause or causes," as well as a hearing before the school committee. The Act did not materially alter these "rudimentary rights" of teachers without professional teacher status. **[*6]** Accordingly, whatever may be the meaning of the statement that teachers without professional teacher status "shall otherwise be deemed employees at will," contrary to the committee's view, such teachers cannot summarily be dismissed without observing the rudimentary rights provided by statute.

While the Act significantly gave principals "primary responsibility for hiring, disciplining, and terminating teachers [and other assigned personnel]," *G. L. c. 71, § 59B*, the "Legislature did not grant principals unfettered discretion . . . ." *School Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 761, 784 N.E.2d 11 (2003)*. They must follow the strict procedural and substantive provisions in *G. L. c. 71, § 42*, as appearing in St. 1993, c. 71, § 44. Cf. *ibid.* "[B]y enacting *§ 59B*, the Legislature carefully balanced school-based management reforms with the district-wide needs of school systems and the collective bargaining rights of school employees over the terms and conditions of their employment." *Id. at 762*. In fact, *G. L. c. 71, § 38*, mandates that a superintendent of schools "shall require the evaluation . . . of teachers without professional teacher status every year," and that the **[*7]** procedures for conducting those evaluations "shall be subject to the collective bargaining provisions of [c. 150E]." *G. L. c. 71, § 38*, third par., as amended through St. 1993, c. 71, § 40 (essentially unchanged from version of statute in effect prior to 1993).

The central issue in Haseltine's grievance, and the subject of arbitration, was her claim that the committee dismissed her without following the evaluation procedures set forth in the CBA. [4] We think it readily apparent that those procedures fall within the statutory framework that provides for the evaluation of teachers; provides notice and hearing protections for teachers without professional status; and preserves the management prerogatives of the principal and the school committee. "[T]he alleged failure to follow certain practices agreed to by the school committee is arguably a grievance under the terms of the collective bargaining agreement. The question of the arbitrability of these asserted grievances properly may be submitted to an arbitrator and, if the arbitrator concludes that the issue is arbitrable, he may pass on the question whether the school committee adhered to its obligations." *Dennis-Yarmouth Regional Sch. Comm. v. Dennis Teachers Assn., 372 Mass. 116, 120, 360 N.E.2d 883 (1977)*.

> 4 Article XLIII of the CBA, § 43.2, **[*8]** provides that all Tier I nonprofessional status teachers, such as Haseltine, "shall receive a written summative evaluation based upon a minimum of three (3) formal observations." Section 43.3 requires the evaluator to conduct at least three for-

mal and three informal observations, and to share his notes with the teacher afterward.

Section 43.5 states that "[t]he right to appeal is a critical element of the Hull Teacher Evaluation Process," and describes a four-step procedure of appeal to the superintendent of schools.

For these reasons, we conclude that nothing in the Act prohibited arbitration of Haseltine's grievance, and that the arbitrator properly derived his power and authority from the CBA. Compare *School Dist. of Beverly v. Geller, 435 Mass. at 230-231.* See generally *School Comm. of Danvers v. Tyman, 372 Mass. 106, 113, 360 N.E.2d 877 (1977)* (school committee may not surrender its authority to make tenure decisions but may bind itself to follow certain procedures).

The relevant facts underlying the grievance indicate that during her first year (2001-2002) Haseltine was never formally observed in the classroom and received no written observation reports or a summative evaluation by the principal **[*9]** then in office, as required by the CBA. After Dr. Goyette became principal in February, 2002, Haseltine asked about observations and evaluation, but was told they would not be done. Haseltine was reappointed by Dr. Goyette to a second year. There were no formal observations in her second year (2002-2003) until May, when three observations were made, but no post observation reports or a summative evaluation were prepared. No observations or evaluations of Haseltine's performance as a guidance counselor were made.

The arbitrator properly could conclude that there had been a violation of the CBA from the failure to perform the evaluations. He did not transcend the limits of the agreement to arbitrate. Compare *Lawrence v. Falzarano, 380 Mass. 18, 28-29, 402 N.E.2d 1017 (1980)*; *School Dist. of Beverly v. Geller, supra at 230-235.* [5]

5 The committee complains that the arbitrator's decision requires it to comply with an "elaborate set of conditions," contradictory to its assertion of at-will status, and to meet a standard for nonrenewal which is higher than the "just cause" standard applicable to dismissal of teachers with professional status. There is no merit in these complaints. The arbitrator only ordered **[*10]** the committee to follow the procedures it agreed to in the CBA. The arbitrator's decision does not in any way direct how the teaching standards in Appendix E of the CBA are to be substantively applied.

In his award, the arbitrator ordered Haseltine reinstated. [6] In the Superior Court, the committee opposed reinstatement on the ground that the technology courses taught by Haseltine would not be offered because of limited enrollment. Nevertheless, her position was not eliminated, and another teacher was appointed with the same split duties (forty per cent teaching and sixty per cent guidance counselling). The Superior Court judge concluded that ordering reinstatement did not impinge on the committee's authority because a full-time position would have been available had Haseltine's contract been renewed. In this appeal, the committee does not dispute that conclusion and, in any event, makes no separate argument on reinstatement.

6 The arbitrator's award stated: "The School Committee violate[d] [several provisions] of the Association's collective bargaining agreement in the manner in which it evaluated the Grievant prior to the decision not to reappoint her for the 2003-04 school year. Haseltine **[*11]** is to be reinstated to her position in the Hull School system and made whole retroactive to the end of her prior contract. Upon her reinstatement, she will be considered a Tier [I] teacher without professional teacher status. I retain jurisdiction for purposes of remedy only."

We conclude that the arbitrator did not exceed his authority by ordering reinstatement of Haseltine in these circumstances. Because Haseltine's nonrenewal was not based on a conclusion drawn from an evaluation of her performance as a teacher, the order did not impinge on the ultimate authority of the principal or the committee. The order of reinstatement simply required the principal and the committee to follow the procedures agreed to in the CBA. There is ample authority and precedent for such a reinstatement.

"The agreement to follow certain procedures preliminary to exercising its right to decide a tenure question, and to permit arbitration of a claim that it has failed to follow those procedures, does not impinge on a school committee's right to make the ultimate tenure decision." *School Comm. of Danvers v. Tyman, 372 Mass. at 114.* "[R]einstatement of a nonsupervisory teacher who had been treated unfairly because **[*12]** of the breakdown of required teacher evaluation procedures would not impinge on a school committee's nondelegable prerogatives. We agree with the conclusions of the Court of Appeals of New York in *Board of Educ., Bellmore-Merrick Cent. High School Dist., Nassau County v. Bellmore-Merrick United Secondary Teachers, Inc., 39 N.Y.2d 167, 173, 347 N.E.2d 603, 383 N.Y.S.2d 242 (1976)*, where the court said, 'The temporary reinstatement awarded here does not eviscerate the public policy mandate that a board of education evaluate the requisite competence and merit of a teacher before the conferral of tenure. . . . The award merely requires that . . . [the board of education] follow procedures it has agreed to adopt in its decision-making process in the area of tenure.' (Cita-

tions omitted.)" *School Comm. of W. Bridgewater v. West Bridgewater Teachers' Assn., 372 Mass. 121, 127, 360 N.E.2d 886 (1977).* "[R]einstatement . . . was an appropriate remedy where the school committee's failure to reappoint took place 'without observance of [the notice and hearing] procedures prescribed by [the] collective bargaining agreement.'" *School Comm. of W. Springfield v. Korbut, 373 Mass. 788, 793, 369 N.E.2d 1148 (1977),* quoting from *School Comm. of W. Springfield v. Korbut, 4 Mass. App. Ct. 743, 746, 358 N.E.2d 831 (1976).*

Judgment **[*13]** *affirmed.*

CITY OF SOMERVILLE vs. SOMERVILLE MUNICIPAL EMPLOYEES ASSOCIATION.

No. 06-P-1299.

APPEALS COURT OF MASSACHUSETTS

69 Mass. App. Ct. 583; 870 N.E.2d 632; 2007 Mass. App. LEXIS 820

March 9, 2007, Argued
July 23, 2007, Decided

SUBSEQUENT HISTORY: As Corrected August 16, 2007.

PRIOR HISTORY: [1]**

Middlesex. Civil action commenced in the Superior Court Department on July 22, 2005. The case was heard by Herman J. Smith, Jr., J., on a motion for judgment on the pleadings.

City of Somerville v. Somerville Mun. Emples. Ass'n, 2006 Mass. Super. LEXIS 268 (Mass. Super. Ct., June 14, 2006)

DISPOSITION: Judgment affirmed.

COUNSEL: Matthew J. Buckley, Assistant City Solicitor, for the plaintiff.

James F. Lamond for the defendant.

JUDGES: Present: Perretta, Brown, & Cypher, JJ.

OPINION BY: CYPHER

OPINION

[*583] CYPHER, J. The city of Somerville (city) appeals from a judgment of the Superior Court affirming an arbitrator's award in favor of the Somerville Municipal Employees Association (union). The arbitrator found that the city had violated the collective bargaining agreement applicable to unit B employees (CBA) by failing to appoint Paul Nelson, a city employee within unit B of the union, to the position of director of veterans' services and instead appointing Frank P. Senesi, an "outside" candidate. [1] **[*584]** Although the city concedes that the veterans' services director is a union position within unit A, it claims that the authority granted to the mayor by *G. L. c. 115, § 10*, to appoint a veterans' services director is exclusive and nondelegable, and therefore not a proper subject for collective bargaining and arbitration. [2] We conclude that because no material **[**2]** conflict exists between the CBA and *G. L. c. 115, § 10*, the selection process was a proper topic for the CBA and subject to arbitration, and the Superior Court judge properly affirmed the arbitrator's award.

1 The union represents two groups of city employees, unit A and unit B, and as to each unit, the city and union are parties to respective collective bargaining agreements regulating certain terms and conditions of employment.

2 *General Laws, c. 115, § 10*, as amended by St. 1972, c. 122, as here relevant, states:

> "The mayors of cities and the selectmen of towns . . . shall cause to be established and maintained in their respective cities and towns a department for the purpose of furnishing such information, advice and assistance to veterans and their dependents as may be necessary to enable them to procure the benefits to which they are or may be entitled . . . . Each department so established and maintained shall be known as the department of veterans' services, and the officer in charge thereof shall be known as the director of veterans' services. Such director and any assistant or deputy director appointed under this section . . . shall be a veteran and shall be appointed in a city **[**3]** by the mayor, with the approval of the city council, and in a town by the selectmen."

Background. In October, 2003, the city sought candidates for the then vacant position of veterans' services director. Eight persons applied and were interviewed and

evaluated by the city's director of personnel, who recommended that Senesi be appointed to that position by the newly-elected mayor in January, 2004. The union, on behalf of Nelson, an unsuccessful applicant and a unit B member of the union, filed a grievance claiming that the city had violated article VII of the CBA in the appointment of Senesi. [3] Pursuant to the CBA, which provided for final and binding **[*585]** arbitration of disputes arising under the CBA, the grievance proceeded to arbitration.

3 Article VII(h)(2) of the CBA provides:

> "In the case of a vacancy in any Unit A position for which no Unit A employee is selected, Unit B employees may apply and will be considered on the basis of the qualifications established for the position. In the event that any Unit B applicants and any non-Unit B applicants meet the qualification(s) established for the [Unit A] position, and their respective qualification(s) are substantially equal, the [Unit A] **[**4]** position will be filled by the senior Unit B Employee among such applicants."

After a hearing, the arbitrator determined that Nelson possessed qualifications "at least substantially equal" to Senesi, a candidate not covered by the CBA or a union member, and directed the city to appoint Nelson to the position of veterans' services director. The city does not dispute the arbitrator's findings or conclusions respecting the qualifications of Senesi or Nelson. [4]

4 The arbitrator's award states:

> "1. The City of Somerville violated the Parties' Unit B Collective Bargaining Agreement by failing to appoint the Grievant, Paul Nelson, to the position of Veterans' Services Director in or about January 2004.
>
> "2. The City is directed to appoint Paul Nelson to the position of Veterans' Services Director forthwith and retroactive to that date when the position was filled.
>
> "3. The City is directed to make Mr. Nelson whole for all lost wages and benefits. The make whole remedy shall include interest compounded quarterly at 12% on all amounts owed."

The city filed an action in the Superior Court seeking to vacate the arbitrator's award, pursuant to *G. L. c. 150C, § 11(a)(3)*. The union counterclaimed for confirmation **[**5]** of the award, pursuant to *G. L. c. 150C, §§ 10* and *11(d)*. Based on the pleadings, a judge entered judgment affirming the arbitrator's award.

Discussion. Judicial review of matters submitted to arbitration is limited fundamentally to a determination of whether the arbitrator exceeded his authority. See *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990)*, and cases cited. The city argues that the judge erred in affirming the arbitrator's award because the arbitrator exceeded his authority by ruling contrary to what the city claims is the intent of *G. L. c. 115, § 10*, to keep the appointment of a veterans' services director within the exclusive authority of the mayor and outside the collective bargaining process.

The judge concluded that the arbitrator did not exceed his authority, reasoning that whether the mayor can appoint a veterans' services director is not an issue for the CBA or arbitration, however, the procedures to be followed in making that appointment could be, and were, within the CBA and thereby open to arbitration.

[*586] We must determine whether the mayor's appointment authority under *G. L. c. 115, § 10*, is in conflict with the CBA. Such a determination **[**6]** ultimately is for the courts. *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO, 61 Mass. App. Ct. 404, 406, 810 N.E.2d 1259 (2004)*. There are no relevant appellate decisions interpreting *G. L. c. 115, § 10*, and it is not among the statutes listed in *G. L. c. 150E, § 7(d)*, which provides that where an enumerated statute conflicts with a collective bargaining agreement, the terms of the collective bargaining agreement shall prevail.

"Despite earlier intimations that the absence of a statute from the list of laws enumerated in *G. L. c. 150E, § 7(d)*, revealed the intention of the Legislature that a collective bargaining agreement must yield to that statute, see *School Comm. of Danvers v. Tyman, 372 Mass. 106, 109, 360 N.E.2d 877 (1977)*, more recent decisions of the Supreme Judicial Court and this court have focused on the question whether there exists a material conflict between the agreement and the unenumerated statute. In the absence of a material conflict with a statute

not enumerated in *§ 7(d)*, the agreement may be enforced." *Leominster v. International Bhd. of Police Officers, Local 338, 33 Mass. App. Ct. 121, 124-125, 596 N.E.2d 1032 (1992)*.

There long has been a "[r]ecognition in the public sector of areas of management prerogative **[**7]** reserved from the collective bargaining process." *Lynn v. Labor Relations Commn., 43 Mass. App. Ct. 172, 175, 681 N.E.2d 1234 (1997)*. While uncertainties about mandated bargaining subjects in *G. L. c. 150E* (the public employee collective bargaining statute) are "inevitable . . ., the framework for analysis has emerged with workable clarity over time. The reported decisions seem to cluster broadly into three categories, depending on the type of authorizing statute or other law under which the public manager purports to act. We differentiate three categories: (1) specific authorizing laws and regulations that are listed in *G. L. c. 150E, § 7(d)*, including all 'municipal personnel ordinances[s], by-law[s], rule[s] or regulation[s]'; (2) general authorizing statutes; and (3) specific authorizing statutes not included in *§ 7(d)*." *Id. at 177*.

1. *Specific authorizing laws and regulations listed in G. L. c. 150E, § 7(d)*. The city does not rely on any municipal authority in support of its claim that the appointment of a veterans' services director is not subject to arbitration. No argument is **[*587]** made that any ordinance, regulation, or policy prohibited the application of the CBA to this position. Contrast *Somerville v. Labor Relations Commn., 53 Mass. App. Ct. 410, 411-412, 759 N.E.2d 737 (2001)* **[**8]** (where determination of whether collective bargaining rights were applicable to certain employees depended on statutes and provisions of city code).

2. *General authorizing statutes*. "[W]hile an underlying decision may be reserved to the exclusive prerogative of the public employer . . ., the public employer may be required to arbitrate with respect to ancillary matters, such as procedures that the employer has agreed to follow prior to making the decision." *Lynn v. Labor Relations Commn., 43 Mass. App. Ct. at 179*. Beyond the requirement that the veterans' services director be a veteran and be appointed by the mayor, *G. L. c. 115, § 10*, is silent on the process of selecting a veterans' services director. In addition, the city concedes that the position is a union position within unit A, and that no language in the CBA excludes the position from being covered by the CBA. There is no reason apparent on the record that the terms of the CBA should not be applied to the selection process.

The grievance filed by the union concerned the application of article VII(h)2 of the CBA. That provision requires that, under certain limited circumstances, a preference be given to a qualified, senior union **[**9]** member. See note 3, *supra*. There is no reason the mayor should not be required to follow the procedures negotiated in the CBA. Following such procedures in no way surrenders the mayor's authority to appoint the veterans' services director. Compare *School Comm. of Danvers v. Tyman, 372 Mass. at 113* (no reason why school committee may not bind itself to follow certain procedures precedent to making tenure decisions); *Chief Justice for Admin. & Mgmt. of the Trial Ct. v. Office & Professional Employees Intl. Union, Local 6, AFL-CIO, 441 Mass. 620, 628-629, 807 N.E.2d 814 (2004)* (no reason why chief justice may not bind himself to follow certain procedures precedent to making decisions under statutory authority to transfer employees).

3. *Specific authorizing statutes not included in G. L. c. 150E, § 7(d)*. The city mistakenly asserts that as provided by *G. L. c. 115, § 10*, the mayor's authority for the specific, narrow **[*588]** function of the appointment of a veterans' services director would be compromised by collective bargaining or arbitration. We consider whether this is a case in which the "governmental employer acts not under a statute or law listed in [*G. L. c. 150E,] § 7(d)*[,] or under general management **[**10]** powers but instead under the authority of a statute or law authorizing the employer to perform a specific, narrow function or, alternatively, acts with reference to a statute specific in purpose that would be undermined if the employer's freedom of action were compromised by the collective bargaining process or by arbitration." *Lynn v. Labor Relations Commn., 43 Mass. App. Ct. at 180*.

Unlike the statutes reviewed in the cases cited in *Lynn* v. *Labor Relations Commn., G. L. c. 115, § 10*, states only a bare authority to appoint and does not explicitly authorize the mayor to act in areas not subject to collective bargaining or arbitration. See *id. at 181*. That bare authority to appoint cannot be read to prohibit or limit collective bargaining with respect to the selection process. Cf. *Massachusetts Bay Trans. Authy. v. Local 589, Amalgamated Transit Union, 406 Mass. 36, 40, 546 N.E.2d 135 (1989)* (employer prohibited by *G. L. c. 161A, § 19*, from collective bargaining or entering into any collective bargaining agreements regarding matters of "inherent management right").

For these reasons, the terms of the CBA are applicable to the selection of the veterans' services director, and that selection process is **[**11]** subject to arbitration. There is no indication that the arbitrator exceeded his authority. See *School Dist. of Beverly v. Geller, 435 Mass. 223, 229, 755 N.E.2d 1241 (2001)* ("arbitrator exceeds his authority if he ignores the plain language of the [collective bargaining agreement]").

Judgment affirmed.

STAGG CHEVROLET, INC. vs. BOARD OF WATER COMMISSIONERS OF HARWICH. [1]

1 Using standard forms supplied by the Appellate Tax Board (ATB), the aggrieved party, Stagg Chevrolet, Inc., mistakenly named the board of assessors of Harwich as the respondent rather than the board of water commissioners. The water commissioners, however, responded and defended below. The ATB found that the water commissioners were not prejudiced by the misidentification, and treated the appeal as if properly brought against them. As the water commissioners neither objected below nor in their brief on appeal, we treat the misnomer issue as waived under Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

No. 06-P-522

APPEALS COURT OF MASSACHUSETTS

68 Mass. App. Ct. 120*; *860 N.E.2d 696*; *2007 Mass. App. LEXIS 82

December 8, 2006, Argued
January 30, 2007, Decided

SUBSEQUENT HISTORY: As Modified February 15, 2007.

PRIOR HISTORY: **[***1]** Suffolk. Appeal from a decision of the Appellate Tax Board.

DISPOSITION: Decision of the Appellate Tax Board is affirmed.

COUNSEL: Brian W. Riley for the defendant.

Pamela B. Marsh for the plaintiff.

JUDGES: Present: Berry, Dreben, & Kafker, JJ.

OPINION BY: KAFKER

OPINION

[*120] **[**697]** KAFKER, J. Stagg Chevrolet, Inc. (Stagg), sought an abatement of a water bill for its purported usage of over four million gallons of town water during a four-month period, an amount Stagg claimed was over forty-seven times its customary usage. The board of water commissioners denied the abatement. **[*121]** Although the water commissioners were required to inform Stagg of how their decision could be appealed, see *G. L. c. 59, § 63*, [2] their notice to Stagg failed to include this vital information. The water commissioners' decision was therefore deemed a nullity by the Appellate Tax Board (ATB), [3] which extended the time for the filing of Stagg's appeal and awarded the abatement that is the subject of the present appeal. Had the notice been deemed effective, Stagg would have missed the deadline for filing its appeal with the ATB "within three months after the date of the [water commissioners'] decision." *G. L. c. 59, § 65* **[***2]** , as amended through St. 1989, c. 718, § 7.

2 *General Laws c. 40, § 42E*, provides that "the provisions of chapter fifty-nine relative to the abatement of taxes by assessors shall apply, so far as applicable, to abatements [of water charges] hereunder."

3 Pursuant to *G. L. c. 40, § 42E*, the ATB is the agency responsible for water charge abatement appeals.

At issue is the legal effect of a notice that fails to include statutorily required information regarding the appellate process. We conclude that the Legislature mandated that this important information about how to appeal be included in the notice, and therefore the notice of the water commissioners' decision was ineffective for the purpose of determining when to commence the running of the three-month appeal period. We therefore affirm the ATB decision awarding the abatement.

Background. The plaintiff aggrieved party, Stagg, is a dealership for new and used cars located in the town of Harwich. **[***3]** Stagg first began using town water service in 1985, and its water usage was consistent until 1992, when it received a bill for usage of approximately 4.8 million gallons of water over a six-month period. Stagg's water meter was replaced, it was granted a sub-

stantial abatement, and its water usage returned to normal levels.

In June, 2002, Stagg received the water bill presently at issue in the amount of $ 9,083.45, showing over four million gallons of water used for a four-month period. [4] On July 15, 2002, Stagg applied for an abatement. The town had the meter tested, and the testing company reported that the meter was *underreporting* water use. By letter to Stagg dated August 21, 2002, **[**698]** the town **[*122]** water superintendent gave notice to Stagg that "[o]n August 20, 2002, at a regularly scheduled meeting, the Board of Water Commissioners discussed the situation and unanimously voted to deny your application for an abatement due to the test results." This letter did not state that "appeal from such decision . . . may be taken as provided in sections sixty-four to sixty-five B, inclusive," as was required by *G. L. c. 59, § 63*.

4 Again the meter was replaced and Stagg's water usage returned to its prior levels.

[*4]** Stagg requested and was given a second hearing by the water commissioners. [5] By letter to Stagg dated September 24, 2002, the town water superintendent explained that the request was considered and again rejected due to the testing of the meter. This letter also failed to include any information regarding appellate rights.

5 In part, Stagg noted that it did not have an irrigation system, and that it no longer washed customer cars as a courtesy, but instead only washed new cars.

On December 19, 2002, more than three months after the August 20, 2002, decision, Stagg filed a statement under the informal procedure [6] commencing proceedings before the ATB and claiming that its average water bill ranged from $ 109 to $ 156. This was later amended to a petition under the formal procedure on March 21, 2003, which the ATB found to have related back to the original filing. [7] The water commissioners moved to dismiss Stagg's appeal as untimely.

6 See *G. L. c. 58A, § 7A* ("the [ATB] shall establish by rule an alternative procedure [to *G. L. c. 58A, § 7*], hereinafter referred to as the informal procedure, for the determination of petitions for abatement of any tax"). See *Cohen v. Assessors of Boston, 344 Mass. 268, 269-270, 182 N.E.2d 138 (1962)*.

[*5]**

7 In its initial informal petition, Stagg asserted that it made its application for abatement on September 26, 2002, and that it was denied on that date. In its formal petition, Stagg alleged that it made its application for abatement on July 15, 2002, and that it was denied on September 24, 2002.

The ATB denied the motion to dismiss and determined that the water commissioners' notices of August 21 and September 24 were ineffective based on noncompliance with that portion of *G. L. c. 59, § 63*, requiring that the notice shall state "that appeal from such decision . . . may be taken as provided in" *§§ 64* and *65*. [8] As direct authority therefor, the ATB relied on Valley Realty Co. *vs.* Assessors of Springfield, ATB No. 22244, **[*123]** at 45, 48 (April 30, 1945). [9] As the notices were inoperative, the filing on December 19, 2002, was considered "timely as it was within the three-month statutory period for appealing the deemed denial of its application for abatement." [10] The ATB then **[**699]** reached the merits and found for Stagg, reducing the water charge to $ 174.15, consistent with **[***6]** the average of Stagg's customary usage, and ordering an abatement of $ 8,909.30.

8 *Section 63* also incorporates a reference to *G. L. c. 59, §§ 65A* and *65B*, but neither is applicable here.

9 In Valley Realty, the ATB interpreted the 1943 amendment to *G. L. c. 59, § 63*, see St. 1943, c. 79, which added the requirement that the notice of the assessors' decision include direction on how appeal from their decision may be taken. The ATB denied a motion to dismiss an appeal as untimely because "[t]he notice of the assessors' decision on the application [for abatement of real estate taxes] did not state therein that an appeal from such decision may be taken as provided in the statutes." Determining that "such an omission rendered the notice invalid because it failed to comply with the statutory requirement[,]" the ATB employed the same remedy as in the instant matter, treating the application for abatement as "deemed to be denied."

10 When a board of assessors (or, as here, the board of water commissioners) fails to act upon an abatement application "prior to the expiration of three months from the date of filing of such application it shall then be deemed to be denied." *G. L. c. 59, § 64*, as amended by St. 1945, c. 621, § 5. For an appeal of a "deemed denied" application to be timely it must then be filed "within three months after the time when the application for abatement is deemed to be denied as provided in section sixty-four." *G. L. c. 59, § 65*. Here, the ATB found that the application, which had been filed on July 15, 2002, was deemed denied on

October 15, 2002, and that the appeal under the formal procedure related back to the appeal under the informal procedure, which had been filed on December 19, 2002. There is no dispute that the appeal was timely filed if it was an appeal of a deemed denied application.

[*7]** On appeal, the water commissioners challenge only the ATB's determination that Stagg's petition to the ATB was timely under the statutory procedure for seeking abatements set forth in *G. L. c. 59, §§ 63, 64,* and *65* (made applicable here by *G. L. c. 40, § 42E*). [11]

11 The water commissioners do not challenge the ATB's findings and conclusions on the merits.

Discussion. General Laws c. 40, §§ 42A-42E, concern the collection of water charges that, as here, remain unpaid. "*Section 42E* lays out a procedure of abatement and appeals analogous to that available for tax relief, but it relates . . . to a charge under *§§ 42A through 42F* . . . ." *Epstein v. Executive Secretary of the Bd. of Selectmen of Sharon, 22 Mass. App. Ct. 135, 137, 491 N.E.2d 1075 (1986).*

[*124] *General Laws c. 40, § 42E*, as amended through St. 1939, c. 451, § 7, provides, in **[***8]** pertinent part:

> "An owner of real estate aggrieved by a charge imposed thereon under sections forty-two A to forty-two F, inclusive . . . may apply for an abatement thereof by filing a petition with the board or officer having control of the water department . . . If such petition is denied in whole or in part, the petitioner may appeal to the appellate tax board upon the same terms and conditions as a person aggrieved by the refusal of the assessors of a city or town to abate a tax."

General Laws c. 59, § 63, provides, in full:

> "Assessors shall, within ten days after their decision on an application for an abatement, send written notice thereof to the applicant. If the assessors fail to take action on such application for a period of three months following the filing thereof, they shall, within ten days after such period, send the applicant written notice of such inaction. Said notice shall indicate the date of the decision or the date the application is deemed denied as provided in section sixty-four, and shall further state that appeal from such decision or inaction may be taken as provided in sections sixty-four to sixty-five B inclusive." **[***9]**

It is undisputed that the August 21 notice did not comply with the statute. The issue then becomes whether the statutory language is mandatory or merely directory in terms. As explained by Chief Justice Lemuel Shaw in a case involving the failure of assessors to keep their lists of valuations and assessments in the form prescribed by statute, directory provisions are those "designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which, does in no respect affect the rights of tax-paying citizens." *Torrey v. Millbury, 38 Mass. 64, 21 Pick. 64, 67 (1838). Cheney v. Coughlin, 201 Mass. 204, 212, 87 N.E. 744 (1909).*

We conclude that the notice of appellate rights required by *G. L. c. 59, § 63*, is not merely directory. See, e.g., *Mann v. Assessors* **[*125]** *of Wareham, 387 Mass. 35, 39, 438 N.E.2d 826 (1982)*, quoting from **[**700]** *Massachusetts Assn. of Tobacco Distribs. v. State Tax Commn., 354 Mass. 85, 89, 235 N.E.2d 557 (1968)* ("[a] tax statute must be strictly construed and 'all doubts are to be resolved in favor of the taxpayer'"). **[***10]** The August 21 notice did not, as was required by statute, inform the abatement applicant that the decision was appealable, that the ATB was the agency that would be responsible for deciding the appeal of the disputed water bill, and that the appeal needed to be filed within three months of the water commissioners' decision. All this information is important and beneficial to any applicant. It provides a roadmap to guide the appeal, directing the applicant to the ATB, a not-so-obvious place to challenge water bills. It also alerts the applicant to the potentially fatal hazard presented by the three-month window to file. In an increasingly complex and costly legal system, the notice provision serves the valuable purpose of pointing disappointed applicants in the right direction at the commencement of the appellate process.

The failure to comply with the notice requirements in *§ 63* impacts the filing deadlines established in *G. L. c. 59, § 65*, which provides that a person may

> "appeal to the appellate tax board by filing a petition with such board within three months after the date of the assessors' decision on an application for abatement *as provided in* **[***11]** *section sixty-three*, or within three months after the time

> when the application for abatement is *deemed to be denied as provided in section sixty-four*" (emphasis supplied).

Having concluded that the decisions were not noticed as provided in *§ 63*, the ATB nullified the decisions and applied *§ 65*'s alternative "deemed to be denied as provided in section sixty-four" time frame for the filing of appeals. *Section 64* provides, in pertinent part:

> "Whenever a board of assessors . . . fails to act upon said application . . . prior to the expiration of three months from the date of filing of such application it shall then be deemed to be denied . . . ."

In the instant case, however, the water commissioners did not **[*126]** actually fail to act; rather, they issued a defective notice. Although the ATB equated the two by holding that the defective notice nullified the decision itself, the ATB did not fully address *SCA Disposal Servs. of New England, Inc. v. State Tax Commn., 375 Mass. 338, 376 N.E.2d 572 (1978)*, which considered the denial of an application for a sales tax abatement. In *SCA*, the court observed that where the State Tax Commission had taken action and given **[***12]** notice, but notice was never received, the commission had not "fail[ed] to act" so as to trigger the "deemed to be denied" provision of *G. L. c. 58A, § 6. Id. at 340*. In that context, where no notice, rather than defective notice, was received within the statutory period, the court corrected the problem by allowing a reasonable time for appeal based upon the statutory period, "measured from the date of receipt." *Id. at 342*.

Pursuant to *SCA*, we conclude that in the instant matter, the failure to notify the applicant of its appeal rights as required by *§ 63* may be cured by allowing a reasonable time for appeal based on the most relevant statutory standards. Here, where notice has been given, but lacks critical information for the applicant as to its appellate rights, the "deemed to be denied" time frame provides a reasonable time period with dates certain easily ascertained by both parties. It is drawn directly from the statute. It also provides some redress for the failure to inform the applicant **[**701]** of its appellate rights; otherwise, the requirement that notices conform to the legislative directive would be rendered meaningless. **[***13]** For these reasons, we conclude that the ATB properly deemed the appeal timely pursuant to *G. L. c. 59, §§ 63, 64*, and *65*.

The decision of the Appellate Tax Board is affirmed.

So ordered.

SUFFOLK CONSTRUCTION CO., INC. vs. DIVISION OF CAPITAL ASSET MANAGEMENT.

SJC-09733

SUPREME JUDICIAL COURT OF MASSACHUSETTS

449 Mass. 444; 870 N.E.2d 33; 2007 Mass. LEXIS 456

March 6, 2007, Argued
July 13, 2007, Decided

SUBSEQUENT HISTORY: As Corrected August 16, 2007.

PRIOR HISTORY: [*1]**

Suffolk. Civil actions commenced in the Superior Court Department on August 19 and 23, 2005. The cases were consolidated and a question of law was reported by Mitchell J. Sikora, Jr., J. The Supreme Judicial Court granted an application for direct appellate review.

Suffolk Constr. Co. v. Commonwealth, 2005 Mass. Super. LEXIS 640 (Mass. Super. Ct., Dec. 15, 2005)

COUNSEL: Christopher W. Morog (Joel Lewin & Jeremy Blackowicz with him) for the plaintiff.

Daniel J. Hammond, Assistant Attorney General, for the defendant.

The following submitted briefs for amici curiae: Christopher J. Petrini, Glenna J. Sheveland, & Thomas J. Urbelis for City Solicitors and Town Counsel Association.

Roscoe Trimmier, Jr., Richard J. Lettieri, Michael J. Howe, David S. Mackey, & Shelly L. Taylor for Massachusetts Port Authority.

Edward V. Colbert, III, for Boston Bar Association.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, & Cordy, JJ.

OPINION BY: MARSHALL

OPINION

[35] [*444]** MARSHALL, C.J. The issue in this case is whether, by enacting the public records law, *G. L. c. 66, § 10*, and *G. L. c. 4, § 7, Twenty-sixth*, **[*445]** the Legislature intended to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to that law. The case arises in conjunction with a dispute between **[***2]** Suffolk Construction Co., Inc. (Suffolk), as general contractor, and the defendant, the division of capital asset management and maintenance (DCAM), [1] over payment of construction costs for the renovation of the public building in Boston now known as the John Adams Courthouse (the project). In the course of the dispute, Suffolk made two public records requests to DCAM for documents concerning the project. In response, DCAM produced approximately one-half million pages of documents, as well as an index of documents withheld from disclosure on grounds of, among other reasons, attorney-client privilege. Suffolk maintained that the production of the privileged information was required under our holding in *General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 711 N.E.2d 589 (1999)* (*General Elec. Co.*), in which we declined to find an implied exemption in the public records law for information otherwise protected by the attorney work-product doctrine.

1 The full name of the defendant entity is the division of capital asset management and maintenance (DCAM). DCAM is an agency within the executive office of administration and finance charged with, among other things, maintaining public capital **[***3]** facilities in the Commonwealth. See *G. L. c. 7, § 39A (f)*.

In accordance with the public records law, Suffolk filed a complaint in the Superior Court for declaratory and injunctive relief. See *G. L. c. 66, § 10 (b)*. The Superior Court judge denied Suffolk's motion for preliminary injunctive relief and simultaneously reported the following question of law to the Appeals Court: "Do the provisions of the public records law, comprised of *G. L. c. 66, § 10*[,] and *G. L. c. 4, § 7 (26)*, preclude the protection of the attorney-client privilege from records made or received by any officer or employee of any agency of the Commonwealth?" See *G. L. c. 231, § 111*; Mass. R. Civ. P. 64 (*a*), as amended, 423 Mass. 1403 (1996). We granted the parties' joint application for direct appellate review. [2]

2 We acknowledge amicus briefs submitted by the Massachusetts Port Authority, the Boston Bar Association, and the City Solicitors and Town Counsel Association.

[36]** We answer the reported question in the negative. As we **[*446]** discuss more fully below, the attorney-client privilege is a fundamental component of the administration of justice. Today, its social utility is virtually unchallenged. Nothing in the language or **[***4]** history of the public records law, or in our prior decisions, leads us to conclude that the Legislature intended the public records law to abrogate the privilege for those subject to the statute. The result Suffolk seeks -- a global withdrawal of the attorney-client privilege from all documents and records of officials and agencies subject to the public records law -- is not required by the plain terms of the public records law. It would also severely inhibit the ability of government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-a-vis private parties with whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public's strong interest in the fair and effective administration of justice. [3] Answering the reported question in the negative, we remand the case to the Superior Court for further proceedings consistent with this opinion.

3 This case arose in the context of a civil dispute, and the parties' briefs confined themselves to that arena. However, it became clear from a colloquy at oral argument that Suffolk would have us construe **[***5]** the public records law as abrogating the attorney-client privilege in the criminal context as well.

1. *Background.* The factual record is uncontested. In 2001, DCAM designated Suffolk and a joint venture partner [4] as general contractor for the historic restoration of the so-called "old" Suffolk County Court House, now the John Adams Court House, in Pemberton Square, Boston. In the course of its work, and in connection with changes in construction plans and schedules, Suffolk submitted to DCAM a number of "proposed change orders," including omnibus proposed change order 704. If accepted in full, the proposed change orders would have substantially increased DCAM's payments to Suffolk under the contract. [5] In April, 2004, after evaluating proposed change order 704 with its architects and consultants, DCAM denied payment thereunder.

4 The joint venture partner is not a party to this case.

5 Suffolk contended that the proposed change orders were occasioned by inadequacies in the construction documentation it received from DCAM that resulted in extensive and unanticipated additional work.

[*447] On October 7, 2004, Suffolk served two comprehensive public records law requests on DCAM. See *G. L. c. 66, § 10 (a)*. **[***6]** Among other things, Suffolk sought to "inspect and review all documents of every kind" related to the project, including "all documents between and among [the executive office for administration and finance] and/or DCAM, their counsel, agents, employees, consultants and/or counsel for other entities regarding this request." Suffolk claimed that such documents could not "be withheld in light of the holding" in *General Elec. Co.* Over the next eleven months, in what the judge termed "an ongoing incremental process," DCAM produced a large volume of material to Suffolk. Concurrently with the release of documents, DCAM created what the judge termed "an evolving privilege log" that, in its most relevant iteration, identified 189 documents withheld from public inspection on the ground of attorney-client privilege.

In August, 2005, Suffolk filed a verified complaint against DCAM for declaratory **[**37]** and injunctive relief, seeking to compel inspection and review of the withheld documents. See *G. L. c. 66, § 10 (b)*. Simultaneously, Suffolk moved for a preliminary injunction seeking essentially the same relief. [6] DCAM opposed the motion. Four days after Suffolk filed its complaint and motion **[***7]** for preliminary injunction in the instant action, it filed a complaint against DCAM in the Superior Court for breach of contract, in which it sought damages allegedly resulting from uncompensated extra work on the project.

6 Among other things, Suffolk alleged that access to the documents was critical to its defense of multiple subcontractors' claims for compensation.

The Superior Court judge hearing the public records law complaint issued four simultaneous rulings. The first denied Suffolk's motion for preliminary injunction on the grounds that, among other things, "the merits remain arguable, . . . the balance of irreparable harm in light of the merits favors the defendant . . ., [and a] preliminary injunction would alter, rather than preserve, the status quo." See *Packing Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-622, 405 N.E.2d 106 (1980)*. The second ruling ordered DCAM, among other things, to enlarge its privilege index to include additional information relating to its claim of **[*448]** attorney-client privilege. [7] A third order consolidated the two actions Suffolk filed against DCAM. Finally, recognizing that a ruling on Suffolk's

preliminary injunction plea would dispose of the public records case, **[***8]** and that the issue raised by Suffolk had not previously been decided by our appellate courts, the judge reported the above question.

> 7 The order also required DCAM to produce to Suffolk seventy-five documents originally withheld pursuant to the "deliberative process" exemption, see *G. L. c. 4, § 7, Twenty-sixth (d)*, but since acknowledged by DCAM to be outside of the coverage of *subsection (d)* because the relevant policy-making process had concluded and the formal litigation between the parties had commenced. See *id.* On appeal, DCAM asserts that although it has produced the documents previously withheld pursuant to *subsection (d)*, it does not agree as a legal matter that it was obligated to do so. DCAM's assertion is tangential to the question before us, and we express no opinion on it.

In its brief to this court, Suffolk questions whether, under our common law, we recognize an attorney-client privilege in the public sphere. We turn first to this threshold question and, concluding that such a privilege does exist, then consider whether it is abrogated by the public records law.

2. *Discussion.* a. *The attorney-client privilege.* [8] The general features of the attorney-client privilege are **[***9]** well known: the attorney-client privilege shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice. See, e.g., *Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 481, 562 N.E.2d 69 (1990)*, quoting *Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488* **[**38]** *(1888)* ("seal of secrecy" on confidential communications between client and counsel); *Foster v. Hall, 12 Pick. 89, 93, 29 Mass. 89 (1831)* ("the general rule [is] that [where] matters [are] communicated by a client to his attorney, in professional confidence, the attorney shall not be at any time afterwards called upon or permitted to disclose in testimony"). Dating at least from the **[*449]** age of Shakespeare, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).*

> 8 Suffolk argues that we need not reach the question whether the attorney-client privilege applies to government entities because this case concerns only the disclosure of documents under the public records law and "does not raise any question about compelling an attorney (or client) to testify about **[***10]** privileged communications under the Massachusetts Rules of Civil Procedure." However, the reported question specifically asks us to decide whether the attorney-client privilege applies in the context of the public records law. Moreover, although the rules of civil procedure govern privileged materials in the context of civil litigation, the attorney-client privilege is applicable as well to transactional legal matters, and criminal legal proceedings.

One obvious role served by the attorney-client privilege is to enable clients to make full disclosure to legal counsel of all relevant facts, no matter how embarrassing or damaging these facts might be, so that counsel may render fully informed legal advice. In a society that covets the rule of law, this is an essential function. See, e.g., *Hatton v. Robinson, 14 Pick. 416, 422, 31 Mass. 416 (1834)* (attorney-client privilege exists to enable attorney to "successfully to perform the duties of his office").

The individual benefits of the attorney-client privilege mirror its more global functions. By "encourag[ing] full and frank communication between attorneys and their clients," the attorney-client privilege "promote[s] broader public interests **[***11]** in the observance of law and administration of justice." *Upjohn Co. v. United States, supra.* Paradoxically, this is so even though the attorney-client privilege may impede access to relevant facts. The attorney-client privilege "'creates an inherent tension with society's need for full and complete disclosure . . . .' But that is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure." *Matter of a John Doe Grand Jury Investigation, supra at 482*, quoting *In re Grand Jury Investigation, 723 F.2d 447, 451* (6th Cir. 1983), cert. denied, *467 U.S. 1246, 104 S. Ct. 3524, 82 L. Ed. 2d 831 (1984).*

Suffolk does not attack the privilege itself but rather maintains that, in this Commonwealth, the application of the privilege in the public realm is "uncertain." It is not. Our prior decisions have presumed the existence of an attorney-client privilege for public officials and government entities. See, e.g., *District Attorney for the Plymouth Dist. v. Selectmen of Middleborough, 395 Mass. 629, 632 n.4, 481 N.E.2d 1128 (1985)* (assuming without deciding that "public clients have an attorney-client privilege"); *Vigoda v. Barton, 348 Mass. 478, 485-486, 204 N.E.2d 441 (1965)* (letters **[***12]** defendant public official wrote to personal attorney and to assistant attorney general, copies of which were in plaintiff's personnel file, properly excluded from evidence at trial "as confidential communications between lawyer and client"). See also *Judge Rotenberg* **[*450]** *Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 457 n.26, 677 N.E.2d 127 (1977)* (at-

torney-client privilege not found where public officials failed to establish that those present at meeting provided attorney with information needed to advise department).

We now state explicitly that confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege. [9] See **[**39]** generally 1 P.R. Rice, Attorney-Client Privilege in the United States § 4.28, at 124-125 (2d ed. 1999) (noting general application of attorney-client privilege to governmental entities). The necessity of the privilege for governmental entities and officials flows directly from the realities of modern government. Public employees must routinely seek advice from **[***13]** counsel on how to meet their obligations to the public. It is in the public's interest that they be able to do so in circumstances that encourage complete candor, without inhibitions arising from the fear that what they communicate will be disclosed to the world. If counsel, despite all diligence, are unable to gather all of the relevant facts, they will less likely serve the public interest in good government by preventing needless litigation or ensuring government officials' compliance with the law. In short, counsel will be less likely to perform adequately the functions of a lawyer. See, e.g., *Mass. R. Prof. C. 1.1*, 426 Mass. 1308 (1998) (competence); *Mass. R. Prof. C. 1.6*, 426 Mass. 1322 (1998) (confidentiality of information).

9 Like the private claimant, the public claimant of the privilege bears the burden of proof, see, e.g., *Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda), 425 Mass. 419, 421, 681 N.E.2d 838 (1997)* (claimant's burden of proving existence of the attorney-client privilege "extends not only to a showing of the existence of the attorney-client relationship but to all other elements involved in the determination of the existence of the privilege, including **[***14]** (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived").

Because the attorney-client privilege serves the same salutary purposes in the public as in the private realm, "it is now well established that communications between government agencies **[*451]** and agency counsel are protected by the privilege as long as they are made confidentially and for the purpose of obtaining legal advice for the agency." E.S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 127 (4th ed. 2001). See generally *Restatement (Third) of the Law Governing Lawyers § 74* (2000) (recognizing an attorney-client privilege for a government client); *id. at comment b (§ 74* "states the generally prevailing rule that governmental agencies and employees enjoy the same [attorney-client] privilege as nongovernmental counterparts") [10]; 1 P.R. Rice, Attorney-Client Privilege in the United States § 4:28 ("When government agencies consult with legal counsel for the purpose of obtaining legal advice **[***15]** or assistance . . . the attorney-client privilege protects its communications to those attorneys"). See also *Ross v. Memphis, 423 F.3d 596, 601 (6th Cir. 2005)* (existing case law "generally assumes the existence of a governmental attorney-client privilege in civil suits between government agencies and private litigants") (citation omitted). [11] **[**40]** These authorities lend substantial weight to our conclusion **[*452]** that government officials and entities may avail themselves of the protections of the attorney-client privilege. [12]

10 *Restatement (Third) of the Law Governing Lawyers § 74 comment b* also notes: "The objectives of the attorney-client privilege . . ., including the special objectives relevant to organizational clients . . ., apply in general to governmental clients. The [attorney-client] privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture. Communications from such persons should be correspondingly privileged."

11 See *In re the County of Erie, 473 F.3d 413, 418 (2d Cir. 2007)*, and cases cited ("In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential **[***16]** communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance"); *Ross v. Memphis, 423 F.3d 596, 602 (6th Cir. 2005)* (application of privilege promotes "honest and complete" communications between public officials and counsel) (citations omitted); *New York City Managerial Employee Ass'n v. Dinkins, 807 F. Supp. 955, 958 (S.D.N.Y. 1992)* (attorney-client privilege protects written communication from city's counsel to city officials and agencies); *Alliance Constr. Solutions, Inc. v. Department of Corrections, 54 P.3d 861, 869-871 (Colo. 2002)* (relationship between legal counsel for Department of Corrections [DOC] and project manager for DOC's independent contractor privileged regarding DOC's alleged wrongful termination of construction contract); *Lipton Realty, Inc. v. St. Louis Hous. Auth., 705 S.W.2d 565, 570 (Mo. App. 1986)* (letter from

housing authority's counsel to executive director of housing authority concerning property inspection at which attorney was present privileged); *State ex rel. Leslie v. Ohio Hous. Fin. Agency, 105 Ohio St. 3d 261, 267, 2005 Ohio 1508, 824 N.E.2d 990 (2005)* (privilege protects release of public records; allowing **[***17]** privilege would not lead to undesirable result, as "an attorney does not become any less of an attorney by virtue of state agency employment"); *Port of Seattle v. Rio, 16 Wn. App. 718, 724, 559 P.2d 18 (1977)* ("We recognize that public agencies are entitled to effective legal representation . . . . The protection of the confidentiality of the attorney-client relationship is needed to preserve the negotiating power of a public agency condemnor at the bargaining table"); *Peters v. County Comm'n of Wood County, 205 W. Va. 481, 488-489, 519 S.E.2d 179 (1999)*, and cases cited (common-law attorney-client privilege exists for government clients and is not abrogated by open meetings law).

12 There is no merit in Suffolk's claim that Proposed Mass. R. Evid. 502 (d) (6) and *Mass. R. Prof. C. 1.13* comment 6, as appearing in 426 Mass. 1357 (1998), counsel hesitation about the application of the attorney-client privilege to public clients. Proposed Mass. R. Evid. 502 (d) (6) would maintain the attorney-client privilege for public clients only when a court determines that disclosure would "seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding **[***18]** in the public interest." Proposed Mass. R. Evid. 502 (d) (6). The rule is identical to the Uniform Rule of Evidence 502(d)(6). Cf. Proposed Fed. R. Evid. 503(a)(1), as appearing at 56 F.R.D. 183, 235 (1972) (defining "client" for purposes of the attorney-client privilege to include governmental entities and public employees). The Proposed Massachusetts Rules of Evidence have not been adopted. Most States that have adopted Uniform Rule of Evidence 502(d)(6) have rejected its proposed limitation on the attorney-client privilege for public employees and governmental entities. See *Restatement (Third) of the Law Governing Lawyers § 74 comment b.*

Similarly, *comment 6 to Mass. R. Prof. C. 1.13*, which governs lawyers' responsibilities to organizational clients, merely restates what we have held in other contexts, namely that where a government agency is the client, the Legislature may prescribe different laws and regulations concerning client confidentiality. See, e.g., *General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 802-803, 711 N.E.2d 589 (1999)* (*General Elec. Co.*) (public records law reflects Legislature's intent to abrogate attorney work-product protections for public records that **[***19]** do not otherwise fall under one of the specified statutory exemptions).

We turn now to the central issue in this case: whether the public records law extinguishes the attorney-client privilege for government entities and officials subject to that law.

b. *Public records law.* The public records law opens records made or kept by a broad array of governmental entities [13] to **[*453]** public view. [14] See *Worcester* **[**41]** *Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 382-383, 764 N.E.2d 847 (2002)* ("The primary purpose of [the public records law] is to give the public broad access to governmental records"); *Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 436, 446 N.E.2d 1051 (1983)* ("the dominant purpose of the [public records] law is to afford the public broad access to governmental records"). The statute expresses the Legislature's considered judgment that "[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner," *Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158, 385 N.E.2d 505 (1979)*, and that "[g]reater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public **[***20]** confidence in government," *New Bedford Standard Times Publ. Co., v. Clerk of the Third Dist. Ct. of Bristol, 377 Mass. 404, 417, 387 N.E.2d 110 (1979)* (Abrams, J., concurring). Modeled after the Federal Freedom of Information Act (FOIA), *5 U.S.C. §§ 552 et seq. (1996)*, see *General Elec. Co., supra at 803*, the statute obligates certain government entities to produce all "public records" [15] for inspection, examination, and copying in response to a proper public records request made by any "person." See *Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64, 354 N.E.2d 872 (1976)*, quoting **[*454]** *G. L. c. 66, § 10 (a)* (public records available to "'any person' whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity").

13 The requirement to disclose public records is directed to "any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose . . . ." *G.*

L. c. 4, § 7, Twenty-sixth. The supervisor of public records (supervisor), the official charged by the statute to promulgate **[***21]** regulations implementing the public records law, see *G. L. c. 66, § 1*, employs the omnibus term "government entity" to express the range of agencies covered by the statute. See *950 Code Mass. Regs. § 32.03* (2003). A "[g]overnmental [e]ntity" is "any authority established by the General Court to serve a public purpose, any department, office, commission, committee, council, board, division, bureau, or other agency within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth. It shall not include the legislature and the judiciary." *Id.*

14 Although Massachusetts has had a public records law since 1851, the earlier laws were limited and "disappointingly vague." A.J. Cella, Administrative Law and Practice § 1161, at 488 (1986). See generally *Hastings & Sons Publ. Co. v. Treasurer of Lynn, 374 Mass. 812, 815-816, 375 N.E.2d 299 (1978)* (recounting history of public records laws in Massachusetts).

15 The public records law defines "public records" as "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by" any public **[***22]** officer or employee or government agency covered by the statute, and not falling within the statute's enumerated exemptions. *G. L. c. 4, § 7, Twenty-sixth*. See *950 Code Mass. Regs. § 32.03* (defining "public records").

Not every record or document kept or made by the governmental agency is a "public record." The statute specifies fifteen categories of materials or information that fall outside the definition of a "public record," either permanently or for a specified duration. See *G. L. c. 4, § 7, Twenty-sixth (a)-(p)*. See generally *Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. 587, 591-592 & n.14, 823 N.E.2d 375 (2005)* (summarizing statutory exemptions). If a dispute over a withheld document is brought to court, the statute establishes a clear "presumption that the record sought is public" and places the burden on the record's custodian to "prove with specificity the exemption which applies" to withheld documents. *G. L. c. 66, § 10 (c)*.

Nowhere in the public records law is the term "attorney-client privilege" found. In parsing the legal meaning of this statutory silence, we begin with the proposition that a statute is construed to fulfil the Legislature's intent, as found most obviously **[***23]** in the words of the law itself, interpreted according to their ordinary and approved usage. See, e.g., *Milford* **[**42]** *v. Boyd, 434 Mass. 754, 757, 752 N.E.2d 733 (2001)*. In construing the Legislature's intent, we may also enlist the aid of other reliable guideposts, such as the statue's "progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are part." *EMC Corp. v. Commissioner of Revenue, 433 Mass. 568, 570, 744 N.E.2d 55 (2001)* (citations omitted). We consider the statute in light of the common law, *Commonwealth v. Welosky, 276 Mass. 398, 401, 177 N.E. 656 (1931)*, cert. denied, *284 U.S. 684, 52 S. Ct. 201, 76 L. Ed. 578 (1932)*, and we do not construe a statute "as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed." *Riley v. Davison Constr. Co., 381 Mass. 432, 438, 409 N.E.2d 1279 (1980)*, quoting *Pineo v. White, 320 Mass. 487, 491, 70 N.E.2d 294 (1946)*. See *Kerins v. Lima, 425 Mass. 108, 110, 680 N.E.2d 32 (1997)*, quoting *Commercial Wharf E. Condominium Ass'n v. Waterfront Parking Corp., 407 Mass. 123, 129, 552 N.E.2d 66 (1990), S.C., 412 Mass. 309, 588 N.E.2d 675 (1992)* (court "will not presume that the Legislature intended . . . a radical change in the common law without **[***24]** a clear expression of such intent"). We do not overlay the words **[*455]** of a statute with a convention of statutory construction that "would frustrate the general beneficial purposes of the legislation." *Harborview Residents' Comm., Inc. v. Quincy Hous. Auth., 368 Mass. 425, 432, 332 N.E.2d 891 (1975)*.

Suffolk claims that our holding in *General Elec. Co.* requires us to read the public records law as abrogating the attorney-client privilege for government officials and entities within the statute's purview with regard to written communications. We do not agree. In *General Elec. Co.*, a company contesting the proposed designation of its property as a "Superfund" site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, *42 U.S.C. §§ 9601 et seq. (1994)*, sought public records law disclosure of documents held by the Department of Environmental Protection (department). The department claimed that the documents were protected by the common-law attorney work-product doctrine. [16] *General Elec. Co., supra at 799*. We concluded, in relevant part, that the statute and its history expressed the Legislature's intent to abrogate the broad attorney work-product privilege, and instead to provide **[***25]** to attorney work product the narrower, time-limited protection afforded under *G. L. c. 4, § 7, Twenty-sixth (d)*, the so-called "deliberative process" exemption. [17] *Id. at 802-804*.

16 The work-product doctrine, as stated in Mass. R. Civ. P. 26 (b) (3), 365 Mass. 772 (1974), limits the discovery of "documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney . . .)."

17 *General Laws c. 4, § 7, Twenty-sixth (d)*, provides a public records law exemption for "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based."

General Elec. Co. provides no guidance for our analysis of the question at hand. First, there is no merit in Suffolk's premise that, for purposes of construing the public records law, the attorney-client privilege and the work-product doctrine are "virtually indistinguishable." The two **[**43]** doctrines are readily differentiated. **[***26]** As one leading authority has noted:

> "The protection given both attorney-client communications and 'work product' arise from a common assumption **[*456]** -- that an attorney cannot provide full and adequate representation unless certain matters are kept beyond the knowledge of adversaries. The foci of the two doctrines are different, however. With the attorney-client privilege, the principal focus is on encouraging the client to communicate freely with the attorney; with work-product, it is on encouraging careful and thorough preparation by the attorney. As a result, there are differences in the scope of the protection. For example, the privilege extends only to client communications, while work product encompasses much that has its source outside client communications. At the same time, the privilege extends to client-attorney communications whenever any sort of legal services are being provided, but the work-product protection is limited to preparations for litigation."

E.S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 477 (4th ed. 2001). The attorney-client privilege has deep roots in the common law and is firmly established as a critical component of the rule of law **[***27]** in our democratic society. See *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*; *Roberts v. Palmdale, 5 Cal. 4th 363, 380, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (1993)* (attorney-client privilege "is no mere peripheral evidentiary rule, but is held vital to the effective administration of justice"); *Foster v. Hall, 12 Pick. 89, 93, 29 Mass. 89 (1831)*. The work-product doctrine, in contrast, is a "tool of judicial administration, borne out of concerns over fairness and convenience and designed to safeguard the adversarial system, but not having an intrinsic value in itself outside the litigation arena." *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 201 (M.D.N.C. 1988)*. See *Admiral Ins. Co. v. United States Dist. Court for the Dist. of Ariz., 881 F.2d 1486, 1494 (9th Cir. 1989)* (work-product doctrine not a privilege but a "qualified immunity"). See also Mass. R. Civ. P. 26 (b) (3), as appearing in 365 Mass. 772 (1974) (offering limited protection to attorney work product). The distinctly different social value assigned to the two doctrines is reflected in the fact that the attorney-client privilege, which belongs to the client, is with rare exceptions inviolable, surviving even the client's death. See *Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 484, 562 N.E.2d 69 (1990)* **[***28]** ("ordinarily the client's and the public's interests are best served **[*457]** by a rule of confidentiality that applies both before and after the death of the client"). Cf. *Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 115, 676 N.E.2d 436 (1997)* (discussing crime-fraud exception to attorney-client privilege). Attorney work product, an immunity for the attorney, on the other hand, is discoverable on a showing of need. See *Hickman v. Taylor, 329 U.S. 495, 511-512, 67 S. Ct. 385, 91 L. Ed. 451 (1947)* (discussing circumstances in which production of attorney work product may be compelled); Mass. R. Civ. P. 26 (b) (3).

Second, the deliberative process privilege is a "subspecies of work-product privilege that covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re the County of Erie, 473 F.3d 413, 417 n.3 (2d Cir. 2007)*, quoting *National Council of La Raza v. Department of Justice, 411 F.3d 350, 356 (2d Cir. 2005)*. In *General Elec. Co.*, we declined to construe the public **[**44]** record law as implying a broad exemption for attorney work product **[***29]** where the Legislature affirmatively expressed its intent to provide a more limited immunity from production. *General Elec. Co., supra at 802*. There is no "deliberative process" subset of the attorney-client privilege. That the Legislature expressly intended to truncate the protections of the attorney work-product doctrine under the public records law by provid-

ing an exemption from disclosure to a distinct subset of attorney work product, then, does not speak to the Legislature's intentions with regard to the attorney-client privilege. [18] In *General Elec. Co.*, we applied the maxim of statutory construction **[*458]** that the expression of one thing in a statute implies the exclusion of similar things. See *General Elec. Co., supra at 802*; *Harborview Residents' Community, Inc. v. Quincy Hous. Auth., 368 Mass. 425, 432, 332 N.E.2d 891 (1975)*. Here, in contrast, we confront the Legislature's statutory silence on a matter of common law of fundamental and longstanding importance to the administration of justice. As the judge in the Superior Court aptly noted, the withdrawal of the attorney-client privilege from any party or client is "extraordinary." We do not employ the conventions of statutory construction in a **[***30]** mechanistic way that upends the common law and fundamentally makes no sense. See *Sun Oil Co. v. Director of the Div. on the Necessaries of Life, 340 Mass. 235, 238, 163 N.E.2d 276* **[**45]** *(1960)* (statutes to be construed, wherever possible, "in accordance with sound judgment and common sense"). Cf. *Commissioner of Corps. and Taxation v. Dalton, 304 Mass. 147, 150, 23 N.E.2d 147 (1939)* ("A matter may be within the letter of a statute and not come within its spirit, if the matter is beyond the mischief intended to be reached or if to include it would require a radical change in established public policy or in the existing law and the act does not manifest any intent that such a change **[*459]** should be effected"). [19] The holding of *General Elec. Co.* does not lead to the conclusion that, in enacting the public records law, the Legislature mandated that public officials perform their duties without access to legal advice protected by the attorney-client privilege. [20]

18 Nor does Suffolk's appeal to legislative history lend weight to its argument. There is little merit in Suffolk's contention that the Legislature's affirmative rejection of proposed exemption (*k*) from the public records law as enacted in 1973 reflects an intent to abrogate **[***31]** the attorney-client privilege for government officials. Proposed exemption (*k*) would have added to the public records law a "civil litigation" exemption. See *General Elec. Co., supra at 802-803*. Congress included such an exemption in the Federal Freedom of Information Act (FOIA). *Id. at 803-804*. The proposed civil litigation exemption is at once narrower (because it is focused only on litigation) and broader (because it encompasses material other than confidential attorney-client communications) than the attorney-client privilege and is therefore not comparable to the privilege for purposes of this analysis. Nor can the rejection of proposed exemption (*k*) be seen, as Suffolk asserts, as a conscious decision to deviate from Congress's embrace of the attorney-client privilege in FOIA, *5 U.S.C. § 552(b)(5) (1996)*. Rather, as DCAM correctly notes, at the time Congress enacted *5 U.S.C. § 552(b)(5)*, FOIA's cognate of proposed exemption (*k*), it was unclear whether the provision had any applicability to the attorney-client privilege. That question was not resolved until two years after the enactment of the public records law, in *NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)*.

We are **[***32]** equally unmoved by Suffolk's contention that legislative events following our decision in *General Elec. Co., supra*, bear on our analysis. The Legislature several times has considered but has not enacted proposed amendments to the public records law that would specifically exempt attorney-client materials from the public records laws. See, e.g., 2007 Sen. Doc. No. 832 (amending exemption provision, *G. L. c. 4, § 7, Twenty-sixth*, by inserting a new exemption for "attorney work product and attorney-client privileged material"); 2007 House Doc. No. 1624 (same); 2005 Sen. Doc. No. 927 (same); 2005 House Doc. No. 758 (same). Contrary to Suffolk's contention, "[l]egislative inaction gives no instructive signal concerning the construction of a statute enacted by a prior Legislature . . . ." *Klingel v. Reill, 446 Mass. 80, 86, 841 N.E.2d 1256 (2006)*, quoting *Polaroid Corp. v. Commissioner of Revenue, 393 Mass. 490, 496, 472 N.E.2d 259 (1984)*. We are especially reluctant to attribute meaning to suggested amendments that, apparently, never were put to the vote before the entire General Court. See *Franklin v. Albert, 381 Mass. 611, 615-616, 411 N.E.2d 458 (1980)* ("The practicalities of the legislative process furnish many reasons for the lack **[***33]** of success of a measure other than legislative dislike for the principle involved in the legislation") (citation omitted).

19 See *County of Bristol v. Secretary of the Commonwealth, 324 Mass. 403, 407, 86 N.E.2d 911 (1949)* (court will not apply the convention of statutory construction that mention of one thing in statute precludes inclusion of that not mentioned unless "in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included within the sweep of the statute"); *Hiss v. Bartlett, 3 Gray 468, 473, 69 Mass. 468 (1855)* ("The maxim, expressio unius

exclusio est alterius, does not apply except where the two cases are alike").

20 Nor does Suffolk, as it asserts, find support for the result it seeks in two cases preceding *General Elec. Co.* In *Babets v. Secretary of Human Servs., 403 Mass. 230, 526 N.E.2d 1261 (1988)*, we declined the request of the defendant public officials to declare certain documents protected from discovery on the grounds of a so-called "executive privilege," which had not previously been recognized in the Commonwealth and for which the defendants failed to justify a need. See **[***34]** *id. at 233-234, 237-239*. Here, in contrast, we are concerned with the claimed abrogation of a common-law privilege, a privilege well-established.

Similarly, in *District Attorney for the Plymouth Dist. v. Selectmen of Middleborough, 395 Mass. 629, 481 N.E.2d 1128 (1985)*, we rejected the contention of the defendant selectmen that they could shut down an ongoing open meeting in order to hold a closed session with the town attorney for reasons the selectmen acknowledged to fall outside the express statutory exemptions in the open meetings law for closed executive sessions. See *G. L. c. 39, §§ 23A-23C*. That the Legislature intended certain discussions between public officials and their counsel to take place in the open does not imply that no communication between the public counsel and the public client can ever be confidential. See, e.g., *Dunn v. Alabama State Univ. Bd. of Trustees, 628 So. 2d 519, 529-530 (Ala. 1993)* (attorney's ability to fulfil ethical duties under attorney-client privilege unmarred by Alabama sunshine law); *Roberts v. Palmdale, 5 Cal. 4th 363, 381, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (1993)* (neither California's public records nor open meeting law requires public disclosure of written legal opinion from city attorney **[***35]** and distributed to members of city council concerning matter pending before council; "city council needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements"); *Oklahoma Ass'n of Mun. Attorneys v. State, 1978 OK 59, 577 P.2d 1310, 1315 (Okla. 1978)* (finding no legislative intent to abrogate the attorney-client privilege in the open meetings law). But see *Neu v. Miami Herald Publ. Co., 462 So. 2d 821, 823, 825 (Fla. 1985)* (sunshine law applied to "meetings between a City Council and the City Attorney held for the purpose of discussing the settlement of pending litigation to which the city is a party"; "there are no confidential communications to protect" because meetings must be held in public).

We reject Suffolk's argument that construing the attorney-client **[*460]** privilege for public officials to exist separately and apart from the public records law contravenes the Legislature's strong policy favoring open government, or creates incentives for public officials to misuse the attorney-client privilege. Addressing **[***36]** first the operational concerns, we emphasize that public officials seeking the protection **[**46]** of the attorney-client privilege are required to produce detailed indices to support their claims of privilege, as DCAM was ordered by the judge to do in this case. Cf. *Worcester Tel. & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 384, 764 N.E.2d 847 (2002)* (where applicability of public records law exemption is questionable, review may "be accomplished through the use of an itemized and indexed document log in which the custodian sets forth detailed justifications for its claims of exemption"). Attorneys and judges are then free, as always, to test the sufficiency of the claim of privilege. Suffolk has offered nothing other than speculation to support its claim that our holding would open the door to actions of bad faith, or that courts and opposing counsel lack the tools to probe claims of attorney-client privilege.

Nor do we have cause to presume that governmental entities and their counsel will have difficulty winnowing unprivileged from privileged information in response to a public records request. In an era in which public entities are regularly subject to litigation and discovery by private **[***37]** parties, responding to document requests and differentiating among discoverable and undiscoverable material are routine parts of doing business.

"Governments must not only follow the laws, but are under additional constitutional and ethical obligations to their citizens. The [attorney-client] privilege helps insure that conversations between [government] officials and attorneys will be honest and complete. In so doing, it encourages and facilitates the fulfillment of those obligations. . . . 'Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.'" *Ross v. Memphis, 423 F.3d 596, 602 (6th Cir. 2005)*, quoting *In re* **[*461]** *Grand Jury Investigation, 399 F.3d 527, 534 (2d Cir. 2005)*. If the Legislature intended to divest government officials and entities subject to the public records law of a privilege as basic and important as the attorney-client privilege, it would have made that intention unmistakably clear.

3. *Conclusion.* For the reasons stated above, we answer the reported question **[***38]** in the negative and remand the case to the Superior Court for further proceedings consistent with our decision. [21]

21 In light of our holding today, we do not address the question, raised sua sponte by the Superior Court judge, whether adopting Suffolk's proposed construction of the public records law would, in the judge's words, "intrude so deeply into the work of the executive branch of the Commonwealth as to violate the doctrine of separation of powers embodied in *Article 30" of the Declaration of Rights of the Massachusetts Constitution.*

So ordered.

TERESA TODINO vs. TOWN OF WELLFLEET & another. [1]

1 Chief of police of Wellfleet.

SJC-09766

SUPREME JUDICIAL COURT OF MASSACHUSETTS

448 Mass. 234*; *860 N.E.2d 1*; *2007 Mass. LEXIS 14

November 7, 2006, Argued
January 17, 2007, Decided

SUBSEQUENT HISTORY: As Corrected January 31, 2007.

PRIOR HISTORY: **[***1]** Barnstable. Civil action commenced in the Superior Court Department on May 24, 1999. Following review by the Appeals Court, *61 Mass. App. Ct. 1123, 814 N.E.2d 36 (2004)*, motions seeking prejudgment and postjudgment interest were heard by Richard F. Connon, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.
Todino v. Town of Wellfleet, 66 Mass. App. Ct. 143, 845 N.E.2d 1178, 2006 Mass. App. LEXIS 433 (2006)

DISPOSITION: The order directing that interest not be added to the judgment was reversed and the case was remanded for further proceedings.

COUNSEL: Albert R. Mason for the defendants.

Peter L. Freeman for the plaintiff.

The following submitted briefs for amici curiae: Patrick N. Bryant for Boston Police Patrolmen's Association.

Thomas F. Reilly, Attorney General, & Peter Sacks, Assistant Attorney General, for the Commonwealth.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

OPINION BY: COWIN

OPINION

[*234] **[**2]** COWIN, J. We consider whether an incapacitated police officer, injured on duty through no fault of her own, is entitled to interest on back compensation owed to her by her municipal employer. See *G. L. c. 41, § 111F*. After a bench trial in the **[*235]** Superior Court, the judge ordered back compensation, but denied interest on the back pay on the ground of sovereign immunity. By means of *§ 111F*, the Legislature **[***2]** provided that injured persons, such as the plaintiff, are entitled to leave without loss of pay and directed that the amounts due be paid at the same time and in the same manner as the employee's regular compensation. We conclude that it is the Legislature's objective, as demonstrated by the uncommonly forceful language of *§ 111F*, that these injured persons lose no pay as a result of their disabilities, including the time value of compensation due. If this objective is to be achieved, interest must be paid on any delayed funds. Accordingly, we hold that, in order to effectuate the purpose of the statute, a waiver of sovereign immunity must be implied with respect to the payment of interest. We therefore reverse the order of the Superior Court judge directing that interest not be **[**3]** added to the judgment. [2]

2 We acknowledge the amicus briefs submitted by the Attorney General and the Boston Police Patrolmen's Association.

1. *Background*. The facts are not contested and we set forth only what is necessary to **[***3]** understand the dispute. In July, 1997, the plaintiff, Teresa Todino, a special police officer in the town of Wellfleet (town), was struck by a motor vehicle while directing traffic and was incapacitated. Pursuant to *G. L. c. 41, § 111F*, the town placed her on leave without loss of pay. A physician appointed by the town concluded that the plaintiff's recovery was slow and suggested that disability retirement might be appropriate. The chief of police, after learning that the town would bear the retirement expense, mailed to the plaintiff and her treating physician a questionnaire designed to gather information concerning whether the officer was medically able to resume service on a limited basis. The doctor did not timely respond. The chief determined that the unresponsiveness was attributable to the plaintiff and amounted to misconduct and disobedience of a reasonable request. The plaintiff's employment was terminated and incapacity pay discontinued on December 15, 1998.

The plaintiff filed an action for declaratory relief in the Superior Court, seeking reinstatement and incapacity pay pursuant to *G. L. c. 41, § 111F*. On October 31, 2002, after **[***4]** a jury-waived **[*236]** trial, a judge ruled in the plaintiff's favor. He entered a judgment declaring that the termination was unlawful because there were no "legally sufficient" grounds to discharge the plaintiff; that the plaintiff was entitled to a return to her previous employment status; and that she was "entitled to receive leave without loss of pay benefits under *G. L. c. 41, § 111F*, retroactive to December 15, 1998." The Appeals Court affirmed, *Todino v. Wellfleet, 61 Mass. App. Ct. 1123, 814 N.E.2d 36 (2004)*. [3]

3 Further appellate review was denied. *Todino v. Wellfleet, 442 Mass. 1112 (2004)*.

After issuance of the rescript by the Appeals Court, the plaintiff moved in the Superior Court for an order requiring the town to pay prejudgment and postjudgment interest. [4], [5] The judge stated that "[i]n the absence of statutory authority, the [p]laintiff is not entitled to prejudgment [or] postjudgment interest," and denied the plaintiff's motion. [6] The Appeals **[***5]** Court reversed, concluding that, although payment of interest is not expressly provided by *G. L. c. 41, § 111F*, the statute effected a waiver of sovereign immunity for payment of interest because "the necessary implication of the statutory scheme requires prejudgment and postjudgment interest payments against the government employer." *Todino v. Wellfleet, 66 Mass. App. Ct. 143, 148, 845 N.E.2d 1178 (2006)*. We granted further appellate review.

4 Soon thereafter, still having not received any retroactive pay, the plaintiff filed a complaint for contempt, the resolution of which is not reflected in the record. The plaintiff states that she received the retroactive compensation, without interest, on April 25, 2005.

5 The plaintiff's motion states that it is filed pursuant to both *G. L. c. 231A, § 5*, and Mass. R. Civ. P. 59 (*e*), 365 Mass. 827 (1974). At that time, she requested prejudgment and postjudgment interest at a rate of twelve per cent per annum pursuant to *G. L. c. 231, §§ 6B, 6H*. However, the plaintiff has not pursued on appeal her arguments relating expressly to *G. L. c. 231, §§ 6B, 6H*. She also requested interest pursuant to *§ 6C* in both the motion and the appeal. *Section 6C* provides for a lower floating rate specified in *§ 6I* in actions against the Commonwealth.

[*6]**

6 The plaintiff's motion for reconsideration was later denied as well.

[4]** 2. *Discussion*. If a police officer is incapacitated in the performance of official duties, without fault of her own, *G. L. c. 41, § 111F*, directs that certain governmental employers (cities, towns, and fire or water districts) continue the officer's compensation "without loss of pay." The statute requires that **[*237]** the compensation be paid "at the same times and in the same manner as . . . regular compensation." [7]

7 *General Laws c. 41, § 111F*, states in pertinent part:

> "Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of [her] duty without fault of [her] own, or a police officer or fire fighter assigned to special duty by [her] superior officer . . . is so incapacitated because of injuries so sustained, [she] shall be granted leave without loss of pay for the period of such incapacity . . . . All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter."

[*7]** The purpose of *§ 111F* is to prevent any deprivation of pay, either in time or value, during the period of an officer's incapacity. The provision reflects an intention that an incapacitated officer receive leave "without loss" of ordinary compensation. *Id.* It states unequivocally that incapacity pay be treated as, and dispersed in the manner of, regular employment compensation. *Jones v. Wayland, 374 Mass. 249, 260, 373 N.E.2d 199 (1978), S.C., 380 Mass. 110, 402 N.E.2d 63 (1980)*. It thereby acknowledges expressly the special importance of timely compensation during periods of incapacity. The wording of the statute clearly expresses an intent to protect injured officers fully from all reductions in the worth of their compensation, including by temporary loss of use of funds.

Our view finds support in the legislative history on the subject. The Legislature has gradually removed certain inequities in the system of assistance for injured officers. "[P]olice officers (and fire fighters) confront daily risks which most working people ordinarily do not encounter," *Eyssi v. Lawrence, 416 Mass. 194, 200, 618 N.E.2d 1358 (1993)*; but, at one time, financial assistance for injured **[***8]** officers was entirely discretionary. See St. 1888, c. 379. Since then, the legislative trend has been toward improved assistance to injured officers. In 1927, the Legislature specifically authorized payments for "loss of pay by reason of absence from duty . . . because of temporary incapacity caused by injury suffered through no fault of [the officer's] own while in the actual performance of duty." St. 1927, c. 157. Incapacitated

part-time "special police officers" later became entitled to full-time pay. See St. 1952, c. 431, § 2. Discretionary back pay was **[*238]** converted to mandatory leave "without loss of pay" by the promulgation of *G. L. c. 41, § 111F*. See St. 1952, c. 419.

Municipal liability implicates the doctrine of sovereign immunity, which protects the public treasury from unanticipated money judgments. See *New Hampshire Ins. Guar. Ass'n v. Markem Corp., 424 Mass. 344, 351, 676 N.E.2d 809 (1997)*. Sovereign immunity prohibits liability against the "Commonwealth [and] . . . its instrumentalities . . . 'except with [the Commonwealth's] consent, and, when that consent is granted . . . only in the manner and to the extent expressed . . . [by] statute.'" **[***9]** *DeRoche v. Massachusetts* **[**5]** *Comm'n Against Discrimination, 447 Mass. 1, 12, 848 N.E.2d 1197 (2006)*, quoting *General Elec. Co. v. Commonwealth, 329 Mass. 661, 664, 110 N.E.2d 101 (1953)*. "[T]he 'rules of construction governing statutory waivers of sovereign immunity are stringent.'" *DeRoche v. Massachusetts Comm'n Against Discrimination, supra*, quoting *C & M Constr. Co. v. Commonwealth, 396 Mass. 390, 392, 486 N.E.2d 54 (1985)*.

But even a strict interpretation must be reasonable, 3 N.J. Singer, Sutherland Statutory Construction § 58:2, at 90 (6th ed. 2001), and our focus remains on the intent of the Legislature. *DeRoche v. Massachusetts Comm'n Against Discrimination, supra at 12-13*. If sovereign immunity is not waived expressly by statute, see *Bain v. Springfield, 424 Mass. 758, 763, 678 N.E.2d 155 (1997)*, we consider whether governmental liability is necessary to effectuate the legislative purpose. *Bates v. Director of Office of Campaign & Political Fin., 436 Mass. 144, 173-174, 763 N.E.2d 6 (2002)*. Where, as here, the Legislature provides expressly that payments shall be made by a municipality or district, waiver of sovereign immunity **[***10]** as to those elements is obvious. Otherwise, the statute would be ineffective, and "[w]e will not impute [to the Legislature] . . . an 'intention to pass an ineffective statute.'" *Id.*, quoting *Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 548, 39 N.E.2d 87 (1942)*.

The statute is silent, however, on the question whether a governmental employer must pay interest on amounts due the employee where payment has been delayed. The plaintiff argues that recovery of interest is necessarily implied by *G. L. c. 41, § 111F*, because interest is essential to vindicate fully an employee's express right to continued, timely compensation. **[*239]** Absent interest, the right provided by *§ 111F* would not be realized completely and, as illustrated by the reduction in value of the plaintiff's back compensation that occurred in the course of the town's six year delay in payment, the plaintiff would not be made whole.

We agree with the plaintiff. The recovery of interest is necessarily implied by the potent language of *§ 111F* that requires timely payments and prohibits any reduction of pay. Without the award of interest on delayed payments, the purpose of *§ 111F* **[***11]** would be partially frustrated. "[C]onsidering the time value of the dollar, the only way in which a[n] . . . award will retain its stated worth is by adding interest in order to compensate for delay in payment from that point forward." *Onofrio v. Department of Mental Health, 411 Mass. 657, 660 n.4, 584 N.E.2d 619 (1992)*, quoting *Foley v. Lowell, 948 F.2d 10, 22 (1st Cir. 1991)*. "Interest is awarded by law so that a person wrongfully deprived of the use of money should be made whole for [her] loss." *Perkins Sch. for the Blind v. Rate Setting Comm'n, 383 Mass. 825, 835, 423 N.E.2d 765 (1981)*.

In *Thibeault v. New Bedford, 342 Mass. 552, 557, 559, 174 N.E.2d 444 (1961)*, we awarded interest against a government employer pursuant to the language of *§ 111F* without comment. After the *Thibeault* case, the Legislature rewrote *§ 111F* in part and reenacted the pertinent language in its entirety. See St. 1964, c. 149. We presume the Legislature was aware of our then recent construction of *§ 111F* and assume that its subsequent action reflected acquiescence in our reading of the statute. [8] *Andover Sav. Bank v. Commissioner of Revenue, 387 Mass. 229, 240-241, 439 N.E.2d 282 (1982)*; **[***12]** *Commonwealth v. Hartnett, 69 Mass. 450, 3 Gray* **[**6]** *450, 451 (1855)*. By virtue of subsequent amendments, additional officers were included in the scope of *G. L. c. 41, § 111F*, and provision was made for allocation of "excess" payments and interest from culpable third parties to incapacitated police and other public employees. **[*240]** See St. 1977, c. 646, § 2; St. 1990, c. 313. There is no indication in any of those amendments of a legislative intent to reduce compensation available to officers by means of an assertion of sovereign immunity with respect to interest.

> 8 Later decisions of the Appeals Court also accepted without comment the imposition of interest against sovereign defendants pursuant to *G. L. c. 41, § 111F*. See *Blair v. Selectmen of Brookline, 24 Mass. App. Ct. 261, 266-267, 508 N.E.2d 628 (1987), S.C., 26 Mass. App. Ct. 954, 526 N.E.2d 1317 (1988)*; *Politano v. Selectmen of Nahant, 12 Mass. App. Ct. 738, 740, 744-745, 429 N.E.2d 31 (1981)*.

Recent **[***13]** cases have recognized an implicit waiver of sovereign immunity with respect to interest when the Legislature has expressed an intent to provide complete relief by giving a broad delegation to agencies. See *DeRoche v. Massachusetts Comm'n Against Discrimination, supra at 14-15*; *Brookfield v. Labor Rela-*

tions Comm'n, 443 Mass. 315, 324-326, 821 N.E.2d 51 (2005). In *DeRoche v. Massachusetts Comm'n Against Discrimination, supra at 13*, we concluded that the language of *G. L. c. 151B, §§ 1, 5, 9*, evidences a legislative desire to provide the victims of discrimination full redress. Although we recognized that there was no express waiver of sovereign immunity for interest, we stated that "the statute . . . logically read . . . lead[s] to the inevitable conclusion that the Legislature must have chosen to subject public employers to" liability for interest, as well as damages. *Id.* We said: "[W]e are satisfied that the Legislature has expressed its intention, manifest through a natural and ordinary reading of the statute, that sovereign immunity with respect to the imposition **[***14]** of interest on a *G. L. c. 151B* damage award has been waived." *Id. at 14*. Similarly, in *Brookfield v. Labor Relations Comm'n, supra at 325-326*, in determining whether sovereign immunity had been waived by necessary implication, we stated:

> "While *G. L. c. 150E, § 11*, does not expressly provide for interest, an award of interest on any money paid in connection with the commission's order, arises by necessary implication from the terms of *§ 11*. . . . An award of interest on monetary relief is a necessary remedial component of the statute. A contrary rule would deprive the affected employee of a make whole remedy, and might also have a deleterious effect on the settlement of cases and encourage delay in securing compliance with *G. L. c. 150E*."

In contrast, we concluded that there was not an implicit **[*241]** waiver of sovereign immunity in G. L. c. 258A, § 5, [9] which provides for the payment of compensation by the Commonwealth to certain victims of violent crime. See *Gurley v. Commonwealth, 363 Mass. 595, 599-600, 296 N.E.2d 477 (1973)*. There, we concluded that the petitioner's reliance on the award of interest in contract **[***15]** cases did not apply "in a noncontractual context where the Commonwealth has voluntarily waived its sovereign immunity to a limited extent in order to compensate victims of violent crimes." *Id. at 600*. It follows that a waiver of sovereign immunity in the context did not require an implicit waiver with respect to interest because, the payment being essentially a gift, no award of interest would be necessary or reasonable. In the present case, however, *§ 111F* expressly contemplates payments that will insure the injured employee against *any* loss of income, including its **[**7]** time value, thereby requiring the payment of interest on any delayed payments in order to achieve the statutory objective.

> 9 The statute at issue in *Gurley v. Commonwealth, 363 Mass. 595, 296 N.E.2d 477 (1973)*, has since been repealed and a new one enacted in its place. See St. 1993, c. 478, §§ 3, 6.

There is no sound policy reason for a contrary interpretation. A town that withholds pay realizes time value from the retained **[***16]** funds. That violates both the letter and the spirit of *§ 111F* and encourages delay as a matter of course. It could not have been the Legislature's intention to reward municipalities for disobeying its express commands concerning the timeliness of incapacity pay under *§ 111F*.

3. *Conclusion*. For the foregoing reasons, the order of the Superior Court denying imposition of interest is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

WILLIAM B. RICE EVENTIDE HOME, INC. vs. BOARD OF ASSESSORS OF QUINCY.

No. 06-P-1440

APPEALS COURT OF MASSACHUSETTS

69 Mass. App. Ct. 867; 2007 Mass. App. LEXIS 938

May 1, 2007, Argued
August 27, 2007, Decided

PRIOR HISTORY: [1]**

Suffolk. Appeal from a decision of the Appellate Tax Board.

COUNSEL: Paul N. Barbadoro for the taxpayer.

Robert Quinn for board of assessors of Quincy.

JUDGES: Present: Rapoza, C.J., Cypher, & Kantrowitz, JJ.

OPINION BY: KANTROWITZ

OPINION

[*867] KANTROWITZ, J. On June 14, 2004, the William B. Rice Eventide Home, Inc. (Eventide), a nursing facility and qualified charitable organization, entered the tax "twilight zone." On that date, it received its first property tax bill in the nearly eighty **[*868]** years of its existence, ordering it to pay $ 105,992.81 for fiscal year 2004. One half of that amount, $ 52,996.41, was due February 2, 2004 (as noted on the bill, that was also the cutoff date to apply for an abatement); the remainder being due on May 3, 2004.

That Eventide presumptively was liable for a property tax it never had to pay in its history was disconcerting enough; that the payments were overdue when the bill was received added to its confusion, as did the notice on the bill that the period to appeal had ended in February. Another notation on the bill, that identified Eventide as "Ex-Char.Org," an exempt charitable organization, was even more confounding.

Eventide contacted the board of assessors of Quincy (assessors), and after speaking **[**2]** with them, filed an application for abatement under *G. L. c. 59, § 59*, which was ultimately denied. [1] Eventide appealed to the Appellate Tax Board (Board), which dismissed the appeal on the ground that it lacked jurisdiction.

1 Despite the adverse ruling against it, Eventide is still treated by the assessors as a charitable nonprofit organization for purposes of excise tax and licensing fees. Moreover, the Appellate Tax Board (Board) concluded that Eventide, for fiscal year 2005, was entitled to a charitable exemption for the same property that is the subject of this appeal.

On appeal, Eventide argues that, as a charitable organization, it was procedurally unable to pursue a direct appeal to the Board and that it should be able to proceed with its appeal from the denial of its abatement request. We reverse. [2]

2 The real estate taxes on this property for fiscal year 2005 and upon two other combined parcels for both fiscal years 2004 and 2005, tried below, are not presently at issue.

Background. As presently material, Eventide, which qualifies as a charitable organization under *26 U.S.C. § 501(c)(3) (2000)* and under *G. L. c. 180*, operated a sixty-bed skilled nursing facility on its property **[**3]** located at 215 Adams Street in Quincy during fiscal year 2004. [3] For fiscal year 2004, the assessors reversed their long-standing treatment of the property as tax **[*869]** exempt, and on or about June 14, 2004, Eventide received the real estate tax bill ($ 105,992.81) that is the subject of this appeal. The bill indicated it was an "omitted" tax bill [4] and stated that the first payment was due four months earlier, on February 2, 2004. [5] However, the bill still described Eventide as an "Ex-Char.Org.," which apparently means "Exempt Charitable Organization." Subject to other requirements, a charitable organization is exempt from paying taxes on real estate it owns or occupies for purposes for which it was organized. See *G. L. c. 59, § 5*, Third.

3 Most of Eventide's residents were in their nineties with some over 100 years of age. While the residents were primarily from Quincy, residents also came from other communities. Eventide was open to most, if not all, individuals that applied, and there were no selection requirements, financial or otherwise, that affected an in-

dividual's admission, so long as their medical needs could be met. Eventide's residents were not capable of living independently, **[**4]** and its staff provided assistance with daily living activities, as well as enhanced services, such as discussion groups, musical programs, and games to stimulate the residents, because such services improved the quality of their lives and resulted in fewer hospitalizations. From October 1, 2003, through June 30, 2004, when the industry average for hospitalizations for preventable conditions per facility was 4.63, Eventide had zero hospitalizations. Eventide also provided and hosted many community outreach programs about elder issues, including creating and distributing resource guides to Quincy residents over the age of sixty-five, at no cost to the community. For fiscal years 2004 and 2005, Eventide operated at a loss of $ 701,520 and $ 255,516, respectively.

4 "If any parcel of real property . . . has been unintentionally omitted from the annual assessment of taxes due to clerical or data processing error or other good faith reason, the assessors shall in accordance with such rules, regulations and guidelines as the commissioner may prescribe, assess such person for such property. . . ." *G. L. c. 59, § 75*, as inserted by St. 1989, c. 398, § 1. Eventide argues that "this bill was not **[**5]** the result of a clerical error, but rather the tax was issued as a result of the [assessors] deciding to review the exempt status of the non-profit nursing homes within the City." See note 16, *infra*.

Although the issue was addressed by neither Eventide nor the Board, the late bill may not have been an "omitted" one, but rather an "incorrect" bill under *G. L. c. 59, § 76*, as inserted by St. 1989, c. 398, § 2, which provides: "If any property subject to taxation has been unintentionally valued or classified in an incorrect manner due to clerical or data processing error or other good faith reason, the assessors shall revise its valuation or classification and shall assess any additional taxes resulting from such revision in the manner and within the time provided by section seventy-five and subject to its provisions." Nonetheless, the specific classification of the late tax bill does not affect our decision.

5 The assessors mailed the fiscal year 2004 tax bills on or about December 30, 2003, but, as we have noted, did not issue a bill to Eventide until June 14, 2004.

After making inquiry, Eventide filed an application for abatement with the assessors on or about July 15, 2004. When the assessors **[**6]** did not respond, the application was deemed denied on October 15, 2004. [6] On November 26, 2004, Eventide appealed to the Board, and as of September 13, 2005, when the **[*870]** Board held a hearing on the matter, Eventide had not paid the assessment. As such, the Board held that it lacked jurisdiction over Eventide's fiscal year 2004 appeal because of Eventide's failure to pay the tax assessed in a timely fashion, a jurisdictional defect under *G. L. c. 59, § 64*. [7] Eventide then appealed to this court. [8]

6 "Whenever a board of assessors, before which an application in writing for the abatement of a tax is or shall be pending, fails to act upon said application, except with the written consent of the applicant, prior to the expiration of three months from the date of filing of such application it shall then be deemed to be denied and the assessors shall have no further authority to act thereon . . . ." *G. L. c. 59, § 64*, as amended by St. 1938, c. 478, § 1.

7 The assessors did not challenge the Board's jurisdiction to hear the appeal, but "[t]he [B]oard was, of course, correct in observing that jurisdiction is fundamental and cannot be ignored or waived." *Massachusetts Inst. of Technology v. Assessors of Cambridge, 422 Mass. 447, 452, 663 N.E.2d 567 (1996)*.

8 The **[**7]** assessors did not submit a brief. Counsel for the assessors, however, did appear and was permitted, in the exercise of our discretion, to present oral argument.

Law. General Laws c. 59, § 5, Third (Clause Third), as inserted by St. 1957, c. 500, provides a tax exemption for "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized." An organization seeking an exemption must file documentation as to its tax-exempt status with a city or town's board of assessors as required by *G. L. c. 59, § 29*. [9] Ordinarily, the local board of assessors will review the filings and determine whether to send an organization a tax bill. Upon receiving a tax bill for real estate, a person who claims that the subject property is exempt under Clause Third generally has two options: (1) appeal to the local board of assessors for an abatement pursuant to *G. L. c. 59, § 59*; or (2) appeal directly to the Board pursuant to *G. L. c. 59, § 5B*.

9 In addition, a charitable organization seeking exemption must timely file certain documentation under *G. L. c. 12, § 8F*, with the division of pub-

lic charities in the Attorney General's **[**8]** office. See *G. L. c. 59, § 5*, Third. See also *Children's Hosp. Med. Center v. Assessors of Boston, 388 Mass. 832, 837, 448 N.E.2d 748 (1983), S.C., 393 Mass. 266, 471 N.E.2d 67 (1984)*. Eventide satisfied both filing requirements for fiscal year 2004.

Under the first option, *G. L. c. 59, § 59*, a person who receives a tax bill when a city or town's board of assessors mail the fiscal year tax bills to the community must apply for an abatement on or before the last day of the first installment payment, **[*871]** without incurring interest. However, "a person aggrieved by a tax assessed upon him under section seventy-five [omitted bill] or section seventy-six [incorrect bill] or reassessed upon him under section seventy-seven may apply for such abatement at any time within three months after the bill or notice of such assessment or reassessment is first sent to him." *G. L. c. 59, § 59*, as amended through St. 1963, c. 125.

Thereafter, if the application for abatement is denied, the person may, within three months of such denial, appeal therefrom to the Board pursuant to *G. L. c. 59, §§ 64* and *65*. As a condition precedent for the Board's jurisdiction to hear the appeal, the person must first pay the specified sum of the assessed tax. **[**9]** *G. L. c. 59, §§ 64, 65*. [10]

10 "[F]or the purposes of this section a sum not less than the average of the tax assessed, reduced by abatements, if any, for the three years next preceding the year of assessment may be deemed to be the tax due, provided that a year in which no tax was due shall not be used in computing such sum and *if no tax was due in any of the three next three preceding years, the sum shall be the full amount of said tax due*, but the provisions of said section fifty-seven of said chapter fifty-nine shall apply to the amount of the tax deemed to be due and the payment of said sum without incurring any interest charges on any part thereof shall be deemed to be the payment of the tax" (emphasis added). *G. L. c. 59, § 64*, as amended through St. 1982, c. 653, § 6. Here, because Eventide had never been assessed nor paid a tax in the past, *§ 64* required it to pay the full amount of the tax due. But see note 13, *infra*.

Under the second option, *G. L. c. 59, § 5B*, as inserted by St. 1977, c. 992, § 3, the Legislature has carved out a direct route of appeal to the Board for any "person" [11] claiming that it is exempt under Clause Third as a charitable organization, or for any competitor **[**10]** of the charitable organization challenging the eligibility of such person:

"Any person of a city or town aggrieved by a determination of the board of assessors as to the eligibility or noneligibility of a corporation or trust for the exemption granted pursuant to the clause Third of section five may appeal therefrom by filing a petition with the clerk of the appellate tax board in accordance with the provisions of **[*872]** section seven of chapter fifty-eight A within three months of said determination."

11 "As used in this section the term 'person' shall mean the corporation or trust applying for the exemption or an individual, corporation, or trust engaged in a business activity in direct competition with an activity conducted by the charitable corporation or trust." *G. L. c. 59, § 5B*, as inserted by St. 1977, c. 992, § 3.

Thus, an entity claiming exemption by reason of its status as a charitable organization under Clause Third may apply directly to the Board, without first applying to a local board of assessors for an abatement, and without paying the assessed tax due. Not having to pay the tax in advance would appear to make this route the preferable one. An appeal to the Board under *§ 5B* must **[**11]** be filed within three months of the "determination" of the local board of assessors as to an entity's exemption as a charitable organization. What constitutes a "determination" under *§ 5B* is not defined in the statute and has not been construed by an appellate court.

The Board, however, has previously construed the term, and it is this construction, upon which Eventide relied, that forms the basis for this appeal. In *Trustees of Reservations* v. *Assessors of Windsor*, 14 Mass. App. Tax Bd. Rep. 22, 27-30 (1991) (*Trustees*), the Board held that the term "determination" in *§ 5B* referred to the date when a local board of assessors mailed its fiscal year tax bills, not any subsequent date when an individual determination is made as to a particular organization. The rationale for this position was to allow competitors of an organization a means to easily determine and challenge that organization's eligibility as a charitable organization and for a Clause Third exemption. *Id.* at 28-29. As such, the Board in *Trustees* concluded that such an interpretation was needed to put these competitors on sufficient notice, otherwise it "would have one meaning for . . . charitable organizations [appealing **[**12]** their own determination] and a different meaning for their competitors." *Id.* at 28. "A construction of *[§] 5B* that the mailing of the tax bills may be the 'determination' for purposes of an appeal by '[a]ny person . . . aggrieved' would likewise relieve both charitable organizations and their competitors from checking regularly with the assessors." *Id.* at 29.

Discussion. Eventide found itself in a difficult position. After decades of acceptance as an exempt charitable

organization without being assessed or paying real estate taxes, not only did it receive a tax bill for fiscal year 2004, but it received it on or **[*873]** about June 14, 2004, under the heading "Omitted Bill," nearly six months after the assessors mailed the fiscal year 2004 tax bills to taxpayers. Eventide argued, both to the Board and to this court, that it was without a viable option to appeal this omitted tax. [12]

> 12 According to Eventide, "[a]ssuming the bill was issued by mistake Joyce Haglund, Eventide's administrator, sought clarification from the [assessors], which resulted in Eventide filing an application for statutory exemption with the [assessors] within thirty (30) days." Eventide does not argue that the information **[**13]** received from the assessors resulted in an estoppel claim. See *Corea v. Assessors of Bedford, 384 Mass. 809, 810, 427 N.E.2d 925 (1981)* (where it did not appear that statements made by assessors led plaintiffs to rely on date other than that of written denial for purposes of computing time to appeal assessment, assessors were not estopped from asserting that three-month period ran from date of written denial).

First, Eventide claimed that it was unable to apply for an abatement under *G. L. c. 59, § 59*, because the date of the first payment installment, February 2, 2004, had already passed; second, Eventide claimed that it was unable to appeal directly to the Board under *G. L. c. 59, § 5B*, because it was more than three months since the "determination" date as defined by *Trustees*, *supra*. We will deal with each argument in turn.

Eventide's argument that it was unable to pursue an abatement under *G. L. c. 59, § 59*, is unavailing. First and foremost, Eventide did indeed apply for an abatement to the assessors. Further, Eventide's reading of the statute is incorrect. It claimed that, because it was sent the bill on June 14, 2004, it was impossible for it to apply for an abatement under *§ 59* because it would **[**14]** have had to do so on or before February 2, 2004 (the first installment payment date, as appearing on the bill), which had already passed. See *G. L. c. 59, § 59*.

Here, however, Eventide received an omitted tax bill, see *G. L. c. 59, § 75*, which was subject to a different abatement application deadline, specifically three months from the date the omitted bill was sent. See *G. L. c. 59, § 59*. Eventide, having been sent the omitted bill on June 14, filed its abatement application on July 15, well within the three-month period.

Eventide's main concern appears to be with the subsequent *§ 64* appellate process; specifically, that as a charitable organization, it was still required to pay the full amount of the **[*874]** tax to be able to appeal. By unsuccessfully applying for an abatement, Eventide was responsible for paying the full amount of the taxes due, $ 105,992.81, to preserve its right to appeal, but never did. [13] "Since the remedy of abatement is created by statute, the [B]oard lacks jurisdiction over the subject matter of proceedings in which this remedy is sought where those proceedings are commenced at a later time or prosecuted in a different manner from that prescribed by statute." *Nature Church v. Assessors of Belchertown, 384 Mass. 811, 812, 429 N.E.2d 329 (1981)*. **[**15]** See *Children's Hosp. Med. Center v. Assessors of Boston, 388 Mass. 832, 838, 448 N.E.2d 748 (1983)*, *S.C.*, *393 Mass. 266, 471 N.E.2d 67 (1984)*. Accordingly, if this matter were to be construed as an appeal pursuant to *§ 64*, the Board's decision would stand.

> 13 Eventide could have sought to be excused from paying at least a portion of the tax due prior to the appeal. See *G. L. c. 59, § 65B* (allowing person, who has filed appeal from local board of assessors' refusal to abate tax and is unable to pay such tax, to file motion to be excused from a portion of such payment so long as it pays at least one-half of tax due, without incurring interest as so provided).

However, while any person, including a charitable organization, may seek to abate a tax through *§ 59*, and may subsequently appeal via *§§ 64* and *65*, see *Children's Hosp. Med. Center v. Assessors of Boston, 393 Mass. 266, 267, 471 N.E.2d 67 (1984)* (exemption is proper basis for abatement under *§ 59*), charitable organizations, like Eventide, or competitors thereof, have an alternative option, the unique benefit of availing themselves of *G. L. c. 59, § 5B*, which allows a direct appeal to the Board without paying any portion of the assessed tax. [14]

> 14 "This construction relieves charitable **[**16]** organizations of the burden of paying a tax . . . as a condition precedent for obtaining a determination by the Board resulting in no tax being due at all . . . ." *Trustees*, 14 Mass. App. Tax Bd. Rep. at 31 n.7.

Eventide argues that it felt compelled to take the *§ 59* route (requiring prepayment of the tax due), and not that of *§ 5B*, based upon its reading of the decision in *Trustees*, *supra*, namely, that the "determination" date, commencing the three-month appeal period, was the date the assessors mailed the fiscal year tax bills to taxpayers. *Trustees*, 14 Mass. App. Tax Bd. Rep. at 27-29. Here, as per *Trustees*, the determination date was December 30, 2003, and three months therefrom would have been on or about March 30, 2004. Eventide, which did not **[*875]**

receive its bill until June 14, 2004, believed that a *§ 5B* appeal was, thus, not an available option.

In its decision, the Board disagreed, quoting *Samson Foundation Charitable Trust* v. *Assessors of Springfield*, 29 Mass. App. Tax Bd. Rep. 159, 162 (2004) (*Samson*): "The 'determination' of the assessors which the charitable entity appeals under *§ 5B* is the issuance of a tax bill which includes the property which the entity claims is exempt **[**17]** under Clause Third." As such, the Board held that, as the determination date is the date of the issuance of a tax bill which includes the exempt property, Eventide could have filed a *§ 5B* appeal directly to the Board within three months of the assessors' issuance of the "omitted" bill.

The *Samson* language, as quoted, would appear to be a significant shift in the Board's definition of "determination": from the date a local board of assessors mail the fiscal year tax bills to the community at large (*Trustees*) to the date when the individual person is sent his individual tax bill referencing the subject property (*Samson*). *Samson*, however, cannot be read as an intention by the Board to effect such a dramatic shift in the Board's interpretation of the term "determination" for the simple reason that it cites *Trustees* in support of its proposition. Furthermore, as the determination date was not in issue in *Samson*, there was no reason to address its definition, much less dramatically change its meaning. [15] Such a statement, in the context of *Samson*, was merely dictum, not ordinarily a vehicle **[*876]** to dramatically change a definition directly addressed in a previous decision issued less than three **[**18]** years previously. In the circumstances, and given the Board's applicable precedents at the time, it was reasonable for Eventide to conclude that its appellate rights under *G. L. c. 59, § 5B*, were foreclosed.

> 15 In *Samson*, the board of assessors of Springfield mailed the tax bills, including that of the plaintiff trust, for fiscal year 2001 on December 29, 2000. The bill stated that the trust was not granted an exemption under Clause Third for its property and that the first payment was due by February 1, 2001. The trust filed an application for abatement on June 29, 2001. As no action was taken on it, the application was thus deemed denied. When the trust filed an appeal with the Board on November 8, 2001, no tax payment had been made. The Board held, among other things, that the trust had failed to satisfy the requirements of *G. L. c. 59, § 5B*, because it had not appealed directly to the Board within three months of the determination date of December 29, 2000, which the Board defined as "the issuance of a tax bill which includes the property which the entity claims is exempt under Clause Third." *Samson*, 29 Mass. App. Tax Bd. Rep. at 162. The Board also held that it did not have jurisdiction **[**19]** to hear the appeal because the application for abatement had been filed after the date when the first installment payment was due, see *G. L. c. 59, § 59*, and because the trust had failed to pay the tax due under *G. L. c. 59, §§ 64* and *65*. *Samson*, *supra* at 161.

The question remains, therefore, as to the proper construction to be given to the term "determination" as it is used in *G. L. c. 59, § 5B*. As noted earlier, the term is not defined in the statute. In addition, it appears that an ambiguity exists between that section and *G. L. c. 59, § 75*, the provision covering omitted tax bills. Unlike *§ 59* (review via an abatement request), which makes specific reference to an omitted bill under *§ 75*, *§ 5B* does not. *Section 5B*, enacted in 1977, is not part of the original statutory law in this area. It appears that the Legislature failed to relate and expressly cross-reference *§§ 5B* and *75*, and did not account for a situation like the present. "[A]mbiguities in taxing statutes are to be resolved in favor of the taxpayer . . . and all doubts are to be resolved in favor of the taxpayer" (quotations and citations omitted). *Mann v. Assessors of Wareham, 387 Mass. 35, 39, 438 N.E.2d 826 (1982)*. Compounding the ambiguity **[**20]** in the statute were the decisions of the Board attempting to interpret the term, which interpretation did not take into account the possibility of later issued omitted tax bills under *§ 75*. We hold today that the "determination" date will ordinarily be the date a local board of assessors mail the fiscal year tax bills, but that in some circumstances, such as the issuance of an omitted tax bill, the presumptive date for the commencement of the three-month appeal period under *§ 5B* shall be the date the tax bill referencing the property for which the exemption is claimed is sent to the taxpayer.

For the purposes of this case, however, our inquiry does not end here. Ordinarily a tax bill sent to an entity, purporting to tax it as nonexempt, will suffice as a determination of the entity's nonexempt status for purposes of a *§ 5B* appeal, even where, as here, the entity has been deemed exempt in the past. The tax bill at issue here, however, was internally inconsistent and ambiguous on its face. The bill, as noted earlier, identified Eventide as an exempt charitable organization. It was reasonable, given **[*877]** Eventide's long history of tax-exempt status, for it to believe the bill might be in error, **[**21]** in other words, that the assessors had not yet made a determination of Eventide's tax-exempt status. Eventide promptly sought clarification of this point by filing an abatement application with the assessors asserting that it was a tax-exempt charitable organization. The assessors did not respond to the application, which was deemed

denied after three months. The constructive denial of Eventide's abatement application constitutes the first clear determination by the assessors that Eventide was not tax exempt. Eventide's appeal to the Board, filed well within three months of that determination, was timely filed under *§ 5B*.

Conclusion. Eventide was placed in an untenable position, in an area fraught with peril, and should not be penalized for the reasonable actions it took. In the unique facts presented by this case, we hold that the Board has jurisdiction to hear the merits of the case, and this matter is remanded for further proceedings consistent with this opinion. [16]

16 At the end of the hearing before the Board, Eventide asserted that the bill was not a properly omitted one; the hearing officer invited briefs on the issue, which Eventide filed. The assessors did not respond, and the **[**22]** hearing officer did not address the issue in his decision. Before us, see note 4, *supra*, Eventide raises the same issue: that an omitted bill is proper when the taxpayer has been unintentionally omitted "due to clerical or data processing error or other good faith reason." *G. L. c. 59, § 75*. See *G. L. c. 59, § 76*. Here, Eventide claims that as the assessors' stated reason for issuing the bill -- to review the exempt status of nonprofit nursing homes within Quincy -- falls outside of the criteria cited in the statute, the omitted bill was in fact invalid. Given our decision, we need not reach this issue. The Board is, however, free to address it.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

BELL ATLANTIC MOBILE CORPORATION, LTD. DBA VERIZON WIRELESS	**v.**	**COMMISSIONER OF REVENUE AND BOARDS OF ASSESSORS OF 220 CITIES AND TOWNS[1]**
Docket Nos. C267959 through C268176, C269027 and C269028		
	AND	
BOARD OF ASSESSORS OF THE CITY OF NEWTON	**v.**	**COMMISSIONER OF REVENUE AND BELL ATLANTIC MOBILE, LLC**
Docket No. C269569		**Promulgated: February 27,2007**

These consolidated appeals concern the Commissioner of Revenue's classification of Bell Atlantic Mobile Corporation, LLC, the predecessor to Bell Atlantic Mobile Corporation, LTD, (together, "Bell Atlantic Mobile") as a "telephone company" subject to central valuation under G.L. c. 59, § 39, the Commissioner's denial of the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d), and the Commissioner's valuation of Bell Atlantic Mobile's property under § 39 for fiscal year 2004 ("§ 39 appeals").

Commissioner Scharaffa heard these appeals and was joined by Commissioners Gorton, Egan and Rose in the decisions for the 220 appellee cities and towns in docket numbers C267959 through C268176, C269027 and C269028 and the decision for the appellant Board of Assessors of the City of Newton in docket number C269569.

Docket numbers C267959 through C268176, C269027 and C269028 are appeals by Bell Atlantic Mobile under G.L. c. 59, § 39 challenging the Commissioner's denial of the corporate utility exemption and his certification of value of certain property owned by Bell Atlantic Mobile and seeking abatements of the taxes assessed by the 220 appellee cities and towns, including the City of Newton. Docket number C269569 is an appeal by the Board of Assessors of the City of Newton under G.L. c. 59, § 39 challenging the Commissioner of Revenue's classification of Bell Atlantic Mobile as a telephone company subject to central valuation under § 39 and alleging that Bell Atlantic Mobile did not qualify for the corporate utility exemption under any circumstance and that the Commissioner undervalued Bell Atlantic Mobile's § 39 property.

The Appellate Tax Board ("Board") also consolidated with the foregoing appeals 220 abatement appeals filed by Bell Atlantic Mobile under G.L. c. 59, §§ 64 and 65 ("§ 65 appeals"). In the § 65 appeals, Bell Atlantic Mobile seeks abatement of taxes paid to the same 220 cities and towns on its machinery, on the grounds that such property is exempt from tax under G.L. c. 59, § 5, clause 16(1)(d) and that it was overvalued. Bell Atlantic Mobile's stated reason for filing these appeals was to protect its right to contest the denial of the property tax exemption because, in its view, it is not clear whether it had a right to contest the exemption denial under § 39. Further, as evidenced by the appeal filed by the City of Newton under § 39, the issue of whether § 39 applied at all to Bell Atlantic Mobile had also been raised and was before the Board.

The Board then bifurcated the hearing of all consolidated appeals to first

[1] A list of the 220 cities and towns named as appellees pursuant to G.L. c. 59, § 39 is appended to these findings.

address all issues other than valuation: specifically, whether Bell Atlantic Mobile is a "telephone company" whose "machinery, poles, wires and underground conduits, wires and pipes" must be centrally valued by the Commissioner under § 39 and whether Bell Atlantic Mobile is entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d). On May 15, 2006, the Board issued a Decision for the 220 appellee cities and towns and the appellant City of Newton in the § 39 appeals in which the Board determined that Bell Atlantic Mobile was not a telephone company subject to central valuation under § 39 and that, because the Board determined that § 39 did not apply to Bell Atlantic Mobile, the Commissioner did not have the authority to allow or deny the property tax exemption claimed by Bell Atlantic Mobile.

Consistent with its Decision in the § 39 appeals, the Board issued an Order in the § 65 appeals, also on May 15, 2006, ruling that Bell Atlantic Mobile: 1) was not subject to central valuation under § 39; 2) was not entitled to the property tax exemption under § 5, cl. 16(1)(d); and 3) was taxable on all personal property owned by it on January 1, 2003 in each of the appellee cities and towns.

The Board stayed further action on the § 65 appeals to allow the parties to seek appellate review of the Board's determination that Bell Atlantic Mobile was not subject to central valuation under § 39. The Board determined that final appellate resolution of this issue prior to a hearing on valuation was necessary because the determination of the proper parties and the valuation and tax assessment parameters in any further Board proceedings are affected by whether Bell Atlantic Mobile is subject to § 39. If the Board is affirmed in its ruling that § 39 is not applicable to Bell Atlantic Mobile, the Commissioner will no longer be a party to the proceedings and, because the valuation issues will be addressed only in the § 65 appeals, the Board's determination of value cannot exceed the assessed values of Bell Atlantic Mobile's property. If, however, it is finally determined that Bell Atlantic Mobile is subject to § 39, the Commissioner would be a proper party to the valuation hearing and the Board could find values under § 39 in excess of those assessed, resulting in the assessment of additional taxes.

These findings of fact and report are promulgated at the request of Bell Atlantic Mobile, the Commissioner, and the Newton Assessors pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Kathleen King Parker, Esq., and *Larry C. Kenna, P.C.,* Esq. for Bell Atlantic Mobile.

Daniel A. Shapiro, Esq. for the Commissioner.

Richard G. Chmielinski, Esq. for the Newton Assessors.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts, testimony and exhibits, the Board made the following findings of fact concerning the identity of the parties, the procedural history of these appeals and the Board's jurisdiction.

I. PARTIES

A. BELL ATLANTIC MOBILE

Bell Atlantic Mobile LLC (the "LLC") was organized in 1999 as a Delaware limited liability company and provided wireless cellu-

lar telecommunications services in Massachusetts under the name "Verizon Wireless." Following this Board's Decision in ***RCN BECOCOM, LLC v. Commissioner of Revenue, et al,*** 2003 A.T.B. Findings of Fact and Report 410, *aff'd* 443 Mass. 198 (2005), which denied property tax exemptions under G.L. c. 59, § 5, clause 16(1)(d) (the "corporate utility exemption") to unincorporated entities such as limited liability companies, and the resulting change in policy by the Commissioner of Revenue's Division of Local Services adopting the Board's ruling in ***RCN***, Bell Atlantic Mobile of Massachusetts, Ltd, (the "corporation" and, together with the LLC, "Bell Atlantic Mobile")[2] was organized as a corporation under the Bermuda Companies Act of 1981 on January 31, 2003. Bell Atlantic Mobile had a principal office located at 180 Washington Valley Road, Bedminster, New Jersey, with a usual place of business in Massachusetts.

Any personal property owned by the LLC as of January 1, 2003 was owned by the corporation on and after January 31, 2003. The corporation also continued to provide the same wireless voice and data services under the name "Verizon Wireless" as had been provided by the LLC prior to January 31, 2003.

B. COMMISSIONER OF REVENUE

The Commissioner of Revenue ("Commissioner") is responsible for valuing, on an annual basis, all "machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph companies" under G.L. c. 59, § 39 ("§ 39 property"). The Commissioner certifies his values under § 39 to all telephone and telegraph companies that own § 39 property and to the cities and towns where such property is located ("central valuation"). The Department of Revenue's Bureau of Local Assessment is the Bureau within the Department of Revenue responsible for making recommendations to the Commissioner for purposes of the Commissioner's obligations under G.L. c. 59, § 39 for the central valuation of § 39 property.

For the fiscal year 2004, the Commissioner classified Bell Atlantic Mobile as a telephone company for purposes of § 39 and centrally valued its property under § 39. In connection with his central valuation, the Commissioner determined that January 1, 2003, and not July 1, 2003, was the relevant date for determining eligibility for the corporate utility exemption, and therefore denied the exemption to Bell Atlantic Mobile because the property at issue was owned by the LLC on January 1, 2003.

C. CITY AND TOWN APPELLEES

The 220 cities and towns to which the Commissioner certified values for fiscal year 2004 for property owned by Bell Atlantic Mobile were named as appellees in accordance with appeal procedures set forth in § 39. In addition, the Board of Assessors of the City of Newton ("Newton Assessors") filed its own appeal from the Commissioner's classification of Bell Atlantic Mobile as a telephone company under § 39 and his certification of value of Bell Atlantic Mobile's property located in Newton. In its appeal, the Newton Assessors alleged

[2] Because the Board's decision in these appeals does not depend on whether the personal property at issue was owned by a corporation or an LLC, these Findings will use the term "Bell Atlantic Mobile" to refer to the LLC and Bell Atlantic Mobile, unless the context requires otherwise.

that: 1) the Commissioner erred by classifying Bell Atlantic Mobile as a telephone company under § 39; 2) Bell Atlantic Mobile did not qualify for the corporate utility exemption, regardless of the qualification date; and, 3) the Commissioner undervalued Bell Atlantic Mobile's property in Newton.

II. PROCEDURAL HISTORY

Pursuant to G.L. c. 59, § 41, Bell Atlantic Mobile timely filed, on March 3, 2003, its fiscal year 2004 return of property it determined was subject to central valuation under § 39. The return listed § 39 property owned by its predecessor, the LLC, on January 1, 2003.

By letter dated March 20, 2003, the Commissioner informed Bell Atlantic Mobile that its return was incorrect because the owner of record as of January 1, 2003, and not its successor, had to file the return and that return should list all property owned by the LLC, including its machinery, as of January 1, 2003. Bell Atlantic Mobile responded by letter of March 24, 2003, stating that the LLC no longer existed and that the corporation was the correct reporting entity. Bell Atlantic Mobile also stated that July 1, 2003, and not January 1, 2003, was the date on which Bell Atlantic Mobile would need to satisfy the requirements set forth in G.L. c. 59, § 5, cl. 16(1)(d) to qualify for the utility exemption. *See* G.L. c. 59, § 5 ("the date of determination as to age, ownership or other qualifying factors required by any clause shall be July first of each year unless another meaning is clearly apparent from the context").

By letter dated March 25, 2003, the Commissioner responded to Bell Atlantic Mobile's March 24, 2003 letter and reaffirmed its earlier position that the LLC, and not the corporation, was the proper party to file the return and that the return must include all § 39 property. On April 4, 2003, Bell Atlantic Mobile filed an amended return which included all § 39 property, including machinery.

On or about May 15, 2003, the Commissioner issued his certified valuation to the LLC, not to the corporation, and to the boards of assessors of every city and town in which personal property listed on Bell Atlantic Mobile's return was located. The Commissioner certified values totaling $469,539,600 for all 220 Massachusetts communities in which the LLC owned personal property on January 1, 2003. Because he determined that January 1 was the relevant date for determining whether entities qualified for the utility exemption and that Bell Atlantic Mobile was an LLC as of January 1, 2003, the Commissioner denied the corporate utility exemption to Bell Atlantic Mobile and valued its machinery used in the conduct of the business, including: antennae, analogue and digital computer components, amplifiers, switching equipment, generators and power equipment.[3]

On May 23, 2003, Bell Atlantic Mobile filed 220 appeals with the Board pursuant to § 39,[4] naming the assessors of the 220 cities and towns, including Newton, and the Commissioner as appellees. The Newton Assessors filed their appeal on June 13, 2003, and an Amended Petition on February 6, 2005, alleging that: 1) the Commissioner's classification of Bell Atlantic Mobile as a telephone company under § 39 was erroneous; 2) Bell Atlantic Mobile was not entitled to the corporate utility exemption regardless of the date used to determine its status; and, 3) the Commissioner's certification of the value of Bell Atlantic

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[3] Bell Atlantic Mobile conceded that generators and power equipment constitute "machinery used in manufacture" and do not qualify for the utility exemption, irrespective of the entity owning such equipment.

[4] On July 16, 2004, Bell Atlantic Mobile also filed 220 appeals under G.L. c. 59, §§ 64 and 65 seeking to recover the taxes paid to the 220 cities and towns in which Bell Atlantic Mobile owned machinery, on the grounds that such property is exempt from tax under G.L. c. 59, § 5, clause 16(1)(d) and that the property was overvalued. These appeals have been stayed for the reasons detailed at pages 3-4 of these Findings.

Mobile's property located in Newton was too low. On the basis of the foregoing, the Board found and ruled that it had jurisdiction to hear these appeals.

III. WITNESSES

A. BELL ATLANTIC MOBILE

Bell Atlantic Mobile presented three witnesses at the hearing of these appeals. Michael J. Mupo, Executive Director of Property Tax for Verizon Wireless, testified as to how the Verizon Wireless mobile wireless network operates. Mr. Mupo described Bell Atlantic Mobile's equipment and its function. Mr. Mupo also testified as to the types of services provided by Bell Atlantic Mobile in 2002 and 2003.

Katherine Abrams, formerly with NYNEX Mobile Communications and then Northeast Area General Counsel for Cellco Partnership (Bell Atlantic Mobile's owner), testified that she had reviewed documents pertaining to Bell Atlantic Mobile's predecessor mobile wireless companies, including their applications for certificates of public convenience, tariffs filed in Massachusetts, and annual reports filed with the Department of Public Utilities ("DPU"). She identified annual reports filed during the years 1988 through 1993 by Bell Atlantic Mobile's predecessors and testified that in certain transmittal letters sent by the DPU to Bell Atlantic Mobile's predecessors during that period, the DPU referenced reporting requirements under both G.L. c. 159 and G.L. c. 166.

As its final witness, Bell Atlantic Mobile offered Robert Werlin, whom the Board qualified as an expert witness in regulatory matters. Mr. Werlin, a former General Counsel, Commissioner and Chairman of the DPU during the years 1984 through 1991, was of the opinion that telephone companies were and are subject to regulation under both G.L. c. 159 and G.L. c. 166. Further, he opined that the deregulation of wireless providers in 1994 did not mean that they were no longer subject to G.L. c. 166.

B. COMMISSIONER

The Commissioner offered Marilyn Brown, Chief of the Bureau of Local Assessment, as his sole witness. Ms. Brown testified as to the Bureau's procedures regarding central valuation under § 39 and the granting of the utility exemption under G.L. c. 59, § 5, clause 16(1)(d). Ms. Brown also testified concerning the Bureau's dealings with Bell Atlantic Mobile for the tax year at issue, and the dispute concerning whether Bell Atlantic Mobile or its predecessor, the LLC, owned the property at issue as of the date of qualification for the utility exemption.

C. NEWTON

Newton offered the testimony of two witnesses in these appeals. The first witness was Andrew Pigney, a consultant in wireless design engineering and related technologies, whom the Board qualified as an expert witness in the field of design engineering for wireless cellular telecommunications providers. Mr. Pigney described the history of radio communications and technology and how it developed separately from, and not as a result of, developments in "land-line" telephone technology. He also described how wireless cellular communications take place and the types of equipment used in wireless communications in general, and the equipment used by Bell Atlantic Mobile in particular.

Newton's second witness was Helen Golding, an attorney specializing in telecommunications and utility regulation who was formerly acting General Counsel to DPU. The Board qualified Ms. Golding as an expert witness in the fields of regulatory and public utility law relating to telecommunications providers. Ms. Golding testified that wireless communications providers are not subject to G.L. c. 166 and therefore are not "utilities" taxable under G.L. c. 63, § 52A whose machinery is exempt under the corporate utility exemption. Underscoring this testimony was her opinion that the competitive nature of the wireless telecommunications industry and its lack of a physical infrastructure of poles, wires, pipes and conduits take wireless providers outside the gambit of G.L. c.

63, § 52A and G.L. c. 166.

On the basis of the testimony of the foregoing witnesses, exhibits and the Statement of Agreed Facts filed by the parties, the Board made the following findings of fact.

IV. MOBILE WIRELESS SERVICE

Bell Atlantic Mobile provides wireless voice and data services using radio frequencies it licenses from the Federal Communication Commission ("FCC") to transmit voice and data over its network. The two principle components of a mobile wireless system are the wireless handset, colloquially referred to as a "cell phone," and the wireless network itself.

A. WIRELESS HANDSET

The wireless handset is a two-way radio device, which is able to maintain communication while moving over a wide area. Through use of the handset, a subscriber can connect with other wireless handsets, a local land-line or "wired" telephone network, the long distance telephone network, the Internet, and other data networks. Available functions in handsets range from basic "cell phones," which can only place and receive calls, to handsets capable of taking and sending photographs and videos, personal digital assistants, pocket and hand-held personal computers("PCs") and organizers, PC cards that plug into notebook PCs, and a host of other communication functions

A cellular call is initiated when a cellular subscriber pushes the "send button" on a wireless handset, The handset emits a radio signal on a specific frequency, also referred to as a "channel," and automatically transmits information identifying the subscriber, the originating cell phone, and the number the subscriber is trying to call. The handset must continually monitor and transmit its location so that connectivity is not lost as its location changes.

The handset uses an internal battery as a power source. However, the electricity generated by the battery to power the handset does not leave the phone. The voice or data signal sent and received by the handset is radio frequency, not electricity.

B. WIRELESS NETWORK

A cellular network is composed of two principle components: base stations and switching stations. A base station, or "cell site," receives and transmits radio signals over a particular geographic area; a typical cellular network consists of many such base stations or "cells" arrayed in a geometric pattern to maximize coverage over a wide area. The cell site contains: an antenna, which is typically a series of domes arrayed in a circular fashion on a tower or tall building to send and receive radio signals from all directions; radio transmission, receiving, and related equipment, which sends and receives radio signals and processes, identifies, and tracks caller location; and a generator and batteries to provide power. Although it owns the antennae and radio equipment located at the cell sites, Bell Atlantic Mobile generally leases, but does not own, space on or in the towers or buildings on which the antennae are located or the buildings which house its radio equipment.

When a subscriber presses the "send" button on the handset, a radio signal is transmitted to a nearby cellular base station. The base station broadcasts information to the subscriber's telephone about the channel on which the call will be placed. The base station receiving the signal sends the call to the nearest Mobile Telephone Switching Office ("MTSO"), where it is determined, among other things, if the call was placed by a valid subscriber, which base stations will handle the call, and on which of several radio channels the call should be handled.

The MTSO acts as the interface between cellular callers and the intended recipients of the voice and data sent. If the subscriber is calling or sending data to a land-line user, the MTSO "switches" the call to copper or fiber-optic

wires owned by the local telephone office or a long-distance carrier; if the recipient is another wireless user, the call or data is transmitted by radio signal to a base station near the recipient. In addition to routing calls from cellular users, the MTSO also performs the reverse function by transmitting calls from land-line users intended for cellular subscribers. The MTSO contains sophisticated computer switching equipment, which among other things, must track the location of one or more wireless users for the duration of a call, to perform its function.

In the operation of its cellular network, Bell Atlantic Mobile does not need or own any poles, wires, pipes or underground conduits. It therefore does not seek municipal grants of location, and does not locate, any wires, pipes or underground conduits upon, over, or beneath public ways. Bell Atlantic Mobile also does not attach any of its personality to poles in public ways.

V. HISTORY OF WIRELESS COMMUNICATION TECHNOLOGY

The history of wireless radio communications began in 1885, when Heinrich Hertz proved the existence of radio waves. Within the following ten years, Guglielmo Marconi is credited with developing the wireless radio telegraph, which was installed on ships to allow for ship-to-ship and ship-to-shore communications. By 1901, the first transatlantic wireless telegraph signal was sent by radio from England to Newfoundland: the letter "s" in Morse code.

As wireless radio communications in the form of wireless telegraphy was just beginning at the turn of the twentieth century, wired telephone and telegraph communication technology was well under way. The first permanent wired telegraph system linking the United States to Europe was established some thirty-four years earlier in 1866. The first wired telephone was tested by Alexander Graham Bell in 1875, the first commercial telephone exchange was opened in 1878, the first commercially successful long distance line, linking Boston and Providence, began in 1881 and, as of 1901, there were approximately 860,000 telephones in use in the United States. The world of wired telephone and telegraph communications was dominated by the American Telephone and Telegraph Company ("AT&T"), which was formed in 1885 and took over the business and property of the American Bell Telephone Company in 1899. Accordingly, while one-way wireless telegraph technology was just beginning to develop at the turn of the twentieth century, AT&T was already offering real-time, two-way conversations over its telephone lines to nearly a million customers, using technology that had been in use for decades.

Meanwhile, radio communications developed during the early nineteen-hundreds, with the United States Navy installing radios aboard its ships, the invention of the diode enabling more efficient power use for the radio, and the first "long distance" wireless call - an eleven mile call from Brant Rock, Massachusetts - being made in 1906. By that date, there were over 2.2 million telephones in use in the United States, more than double the number just five years earlier. By 1910, the number of land-line telephones more than doubled again to 5.8 million.

Congress passed the Radio Act in 1912 to regulate access to radio frequencies and transmissions. A radio message was first sent to an airplane in 1914, and wireless radio service connecting the United States and Japan began one year later. Shortwave radio, allowing for greater range in the transmission of radio signals, was developed in 1919 and a one-way radio messaging service was put in use by the Detroit police department, enabling a dispatcher in the police station to send a message to an officer in his car. By 1924, there were 2.5 million radio sets in the United States.

By contrast, there were 15 million land-line telephones in the country by 1924. Given the growing proliferation of land-line telephones and the perceived need to regulate the communications industry, Congress enacted the Communica-

tions Act of 1934, which created the Federal Communications Commission ("FCC").

In addition to being the only telephone company at the time, AT&T also had a presence in the radio industry for a short period of time. After the Radio Act of 1912, AT&T acquired and held a number of radio licenses. However, AT&T decided to release its radio licenses and divest itself completely of radio, paving the way for the creation of the National Broadcasting Company ("NBC"), which was formed in 1926. By 1934, half of the homes in the United States had radio sets capable of tuning into programming from NBC and other broadcasters.

A breakthrough in wireless communications occurred in 1941, with the first two-way radio installed in a police cruiser. This advance allowed a police officer at a remote location to receive a message from the station and to send a message back to the station. By 1946, the first commercial wireless service was installed in St. Louis, Missouri. Private citizens could now communicate from their vehicles throughout the city using radio signals.

Up until this time, the notion of radio communications generally entailed a broadcaster transmitting a message on a given radio frequency while one or more receivers or listeners tuned into that frequency on their radios. With the advent of two-way radio communication, real-time, two-way conversations could be maintained over radio frequencies, in a manner similar to the communications offered by AT&T's wired network for over half a century. However, although the concepts of cellular communications were being developed with these advancements, it was not until the advent of sophisticated computer technology, enabling multiple users on a given frequency and the ability to maintain connection beyond a limited range, that mobile wireless communications were considered a reasonable and workable option.

It was not until almost forty years later, in 1983, that the first cellular network began operations. By 1985, there were one hundred networks, and in just two more years, there were one million cellular subscribers. The number of cell sites and subscribers grew exponentially, with some 182 million cellular subscribers by 2002.

On the basis of the foregoing, the Board found that wireless and wired, land-line communications are separate technologies, each with a distinct history and development. Wireless technology did not grow out of telephone and telegraph technology; rather, it developed separately, from radio technology, using a completely different medium of communication - airborne radio waves, not electrical or light impulses over wires and cables - and employed unique equipment and infrastructure.

A review of the core equipment of each industry reveals the fundamental difference in their technologies. A wired telephone company requires poles, aerial wires, underground conduits, wires and cables, and phones plugged into the wired network at a fixed location. In contrast, wireless communications take place through the air, requiring radio transmission, receiving and amplification equipment, antennae, towers, and wireless hand units which can send and receive communications while traveling beyond city, state, and national borders.

In addition, although both wired and wireless cellular communications require switching equipment, a wireless switch is significantly more complex and requires more robust computer power to monitor the locations of users and maintain a connection between caller and receiver, both of whom may be moving, and to switch the call to a different cell site or sites as sender or receiver or both move out of range of a particular cell site. Although both a wired and wireless switch may start from the same basic platform, the customization and modification necessary for the wireless switch would be completely unnecessary for a wired switch.

The differences in required equipment and technology led directly to a difference in the competitive nature of the respective industries. Given the significant investment in infrastructure necessary to operate a land-lined tele-

phone network, including purchasing and maintaining poles, wires, underground conduits and wires, and securing the necessary easements and permits to dig under and affix poles on private and public property, there is generally only one local phone company serving a geographic region. In fact, up until the court-ordered breakup of AT&T in 1983 into seven "Baby Bells," AT&T held a monopoly on telephone service in this country for approximately one-hundred years.

In contrast, there generally is no need for a wireless provider to acquire these types of easement rights, permits to access public land, or to make the significant investment in infrastructure necessary to operate a wired network. As a result, there have been various competitors offering the same or similar services as those offered by Bell Atlantic Mobile, including Cingular, Nextel, AT&T Wireless, T-Mobile and Sprint.

The competitive nature of the wireless communication industry as compared with the monopolistic wired telephone industry and their separate developmental histories led to a marked difference in how these industries were regulated by federal and state authorities. Following is an overview of how Commercial Mobile Radio Service ("CMRS") providers are regulated.

VI. REGULATION OF CMRS PROVIDERS

To use the radio frequency spectrum in the United States, wireless communications systems must be authorized by the FCC to operate the wireless network and mobile devices in assigned spectrum segments, and must comply with the rules and policies governing the use of the spectrum as adopted by the FCC. At all material times, Bell Atlantic Mobile was licensed to provide mobile wireless services on the 800 megahertz ("MHz") and 1800-1900 MHz portions of the radio spectrum.

CMRS is a category of services that Congress created to encompass all mobile telecommunications services that are provided for profit and make interconnected service available to the public. CMRS providers include all cellular licensees, as well as paging and specialized mobile radio licensees. The common element of all CMRS providers is that they use a radio frequency or channel instead of a wire to provide communications to and from one or more mobile locations. Bell Atlantic Mobile is a CMRS provider under applicable federal law.

The FCC does not specify the rates wireless service providers may charge for their services nor does it require them to file tariffs for their wireless operations. However, all CMRS providers are common carriers, and as such the FCC may regulate certain terms and conditions under which they provide service. In addition, CMRS providers are defined as "telecommunications carriers" under federal law, which subjects them to further federal regulatory requirements.

Following the 1993 enactment of a federal statute preempting state and local entry and rate regulation of CMRS and private mobile radio service, the Massachusetts Department of Public Utilities ("DPU") issued written Orders holding that it would no longer regulate CMRS providers with respect to rate and entry regulation, and terminated the requirement that CMRS providers obtain certificates of public convenience and necessity before offering services in a particular area. Prior to the 1993 federal statute and the DPU Orders, CMRS providers, including Bell Atlantic Mobile's predecessors, were required by DPU to file annual returns of their business and financial conditions with DPU. Bell Atlantic Mobile has not filed a return with DPU since 1993.

Further, G.L. c. 166, § 12, provides for penalties for a telephone company's failure to file the annual return required under § 11. Although the Department of Telecommunications and Energy ("DTE"), the successor to DPU, initiated enforcement actions in 2003 against forty telecommunications companies for failure to file a return under § 11, neither Bell Atlantic Mobile nor any CMRS provider was among the forty.

VII. CONCLUSION

On the basis of the foregoing and to the extent that it is a finding of

fact, the Board found and ruled that Bell Atlantic Mobile is not a "telephone company" for purposes of G.L. c. 59, § 39. Accordingly, the Board ruled that Bell Atlantic Mobile's "machinery, poles, wires and underground conduits wires and pipes" are not subject to central assessment by the Commissioner under G.L. c. 59, § 39.

In light of the Board's ruling, the issue of whether January 1 or July 1 is the relevant date for determining qualification for the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d) is irrelevant; because the Board determined that Bell Atlantic Mobile was not a telephone company for purposes of § 39 and therefore not subject to central valuation by the Commissioner, the Commissioner lacked the authority to allow or deny the corporate utility exemption claimed by Bell Atlantic Mobile. Moreover, given the Board's analysis in the following Opinion of G.L. c. 63, § 52A and G.L. c. 166 in connection with the proper interpretation of § 39 and the Board's Order in the 220 consolidated § 65 appeals, it is clear that regardless of whether Bell Atlantic Mobile was an LLC or a corporation as of the relevant date, it would not qualify for the exemption because a CMRS provider is not a telephone company subject to taxation under § 52A as required by G.L. c. 59, § 5, cl. 16(1)(d).

OPINION

The fundamental issue raised in these appeals is whether Bell Atlantic Mobile is a "telephone company" for purposes of G.L. c. 59, § 39. In deciding that issue, the Board also looked to the meaning of the phrase "telephone company" as it is used in related statutory provisions, including G.L. c. 63, § 52A and G.L. c. 166. An analysis of the phrase "telephone company" for purposes of these provisions follows.

I. "TELEPHONE COMPANY" FOR PURPOSES OF § 39

G.L. c. 59, § 39 provides that the valuation of the "machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph[5] companies" shall be determined annually by the commissioner, subject to appeal to this Board. The commissioner certifies his values to the telephone companies and to the boards of assessors of each city and town in which the companies' machinery, poles, wires and underground conduits, wires and pipes ("§ 39 property") is located. The local assessors use the commissioner's certified values in their tax assessments of telephone companies' § 39 property.

Section 39 contains no definition of the phrase "telephone companies." In determining whether an entity is a "telephone company" for purposes of § 39, the Supreme Judicial Court has determined that § 39 is a "remedial measure" that must be "construed and applied expansively in order to achieve the Legislature's goals." ***RCN-BecoCom, LLC v. Commissioner of Revenue***, 443 Mass. 198, 201 (2005). In ***RCN,*** the Court held that a company "undeniably engaged in providing telephone services" was a telephone company for purposes of § 39 even though it provided Internet and cable television services in addition to wired telephone services. ***Id.***

A review of the legislative history of § 39 reveals that the goal of the Legislature was to address the specific problem of valuing and assessing the distribution system of wired telephone and telegraph companies:

> The purpose of central valuation is to ensure consistency and competence in the valuation of parts of a Statewide system. The central valuation system began in 1915, following a report from the tax commissioner setting forth local assessors' problems in attempting to value a portion of a system that crossed municipal

[5] There is no allegation that Bell Atlantic Mobile is a "telegraph" company. Accordingly, the Board, like the parties, focuses on whether Bell Atlantic Mobile is a telephone company.

> boundaries and the resulting disparate valuations for affected companies. Report of the Tax Commissioner for Year Ending November 30, 1914, Pub. Doc. No. 16, 27-30 (1915). "It cannot be doubted that [§ 39] was intended to adopt the recommendation of the tax commissioner" to value certain property of telephone and telegraph companies centrally to rectify "inequality in standards of valuation." ***Assessors of Springfield v. New England Telephone & Telegraph Company***, 330 Mass. 198, 202 (1953).

RCN, 443 Mass. at 199.

> In his report, the tax commissioner:
> forcefully directed attention to the difficulties involved in the assessing of poles, wires, and underground conduits by local assessors . . . who were obligated to place values upon fragments of a system which ought to be valued as a whole. He complained that "there has thus grown up in the various cities and towns of the Commonwealth the greatest inequality in standards of valuation for poles, wires and underground conduits. It has been impossible to establish any proper standard of depreciation or to secure adequate consideration of the factors of disuse and abandonment of property. The companies themselves are put to unnecessary inconvenience, and justly complain of the various standards of valuation adopted by the different cities and towns. They find themselves justly irritated where a line of poles and wires is valued at one basis of value per mile in one town and at quite another basis of value in the adjoining town, whereas the property in the two towns is the same in character, in cost of construction and in general condition."

Assessors of Springfield v. New England Telephone and Telegraph Company, 330 Mass. at 202.

Unlike RCN and New England Telephone and Telegraph, Bell Atlantic Mobile has no physical distribution infrastructure that crosses municipal boundaries. It owns none of the very property that concerned the Legislature in 1915 in enacting § 39 - poles, wires and underground conduits, wires and pipes.[6] The property that it does own does not present the type of difficulties which § 39 was intended to address; there is no evidence that Bell Atlantic Mobile's property crossed municipal boundaries, that depreciation, disuse or abandonment of property are relevant considerations for CMRS providers, or that its property in adjoining towns is of the same character, cost of construction, or condition. Accordingly, construing § 39 to include CMRS providers as among the "telephone companies" whose property is to be centrally valued would not serve to achieve the Legislative goal in enacting § 39.

In addition, when the Legislature enacted § 39 in 1915, radio communication was already in existence and presumably known to the Legislature. For ex-

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[6] In discussing the legislative history of § 39, the Court in ***RCN*** and ***Assessors of Springfield v. New England Telephone and Telegraph Co.*** did not separately address a 1918 amendment which added "machinery" to § 39 property. *See* St. 1918, c. 138, § 1. Since the Court looked to the legislative history of the original 1915 enactment in its interpretation of § 39, the Board infers that the addition of "machinery" to § 39 property was consistent with the original legislative intent behind the enactment of § 39. Accordingly, machinery that is part of the physical distribution infrastructure of telephone and telegraph service should also be centrally valued to ensure consistency and competence in the valuation of portions of a statewide system that crosses municipal boundaries.

ample, ship-to-shore radio communications were common and the Radio Act had been passed by Congress in 1912 governing access to radio frequencies. Despite the existence of radio communications in 1915, the Legislature chose not to include radio communications within § 39.

Relying on ***RCN,*** Bell Atlantic Mobile essentially argues that it is a telephone company because it provides telephone service, which it defines as two-way, party-to-party voice communication and data transmission. Because, in its view, it uses equipment similar to wired telephone companies to provide a service that crosses municipal boundaries, Bell Atlantic Mobile maintains that it is a telephone company for purposes of § 39. Finally, it argues that ***RCN*** requires an expansive reading of § 39 that would include CMRS providers within its scope to avoid a "chill" in the advancement of telecommunications as new technology becomes available.[7] ***RCN,*** 443 Mass. at 203-4.

In ***RCN***, the Court rejected the Commissioner's argument that only entities "that engage solely in telephone or telegraph service, to the exclusion of any other business activity" such as Internet and cable television services are telephone companies for purposes of § 39. ***RCN***, 443 Mass. at 203. The Court ruled that this interpretation was "overly restrictive and not consistent with the unambiguous language or underlying purpose of the statute. The Legislature is quite capable of saying 'exclusive' when it means 'exclusive.'" ***Id.***

Further explaining its rejection of an exclusivity test, the Court recognized that "traditional" telephone companies were providing other services and ought not to lose § 39 treatment as these companies made technological advances:

> Neither does an exclusive interpretation comport with the historical role of telephone and telegraph companies that have provided services other than strictly land-based telephone or telegraph services, as the board discussed in its findings below. Finally, adoption of an exclusivity test undoubtedly would act to chill advances in the telecommunication field as new technology becomes available, for fear of outpacing the 1915 definition of a "real" telephone company.

Id.

In ***RCN,*** the Court and the Board were "faced with a company undeniably engaged in providing telephone services" and had to determine whether the company's provision of Internet and cable television services prevented it from coming within § 39. ***RCN*** at 201. The Board's detailed description of RCN's operation reveals the "undeniable" nature of its telephone services: it used a telephone switch to create dial tone and route calls similar to switches used by its telephone company competitors; it used other property at the switching facility dedicated solely to telephone service; it transported telephone, cable television, and Internet signal across a "fiber optic backbone" to "hubs" located in communities serviced by RCN; the signal was then distributed along the backbone to optical receivers located on telephone poles near customers' homes that transformed the signal to travel on coaxial cable; the signal was then delivered to customers over "line drops" connected to "residential service units" located on the outside of a customer's home or business; the telephone line was then separated out on twisted copper lines. ***RCN-BecoCom, LLC v. Commissioner of Revenue, et al*** 2003 ATB Findings of Fact and Reports 410, 420-21.

In contrast, Bell Atlantic Mobile's distribution system does not rely on the extensive physical infrastructure of "fiber optic backbone," "cable," "line drops," "copper lines," or other equipment located on telephone poles or customers' homes or businesses. Rather, the connectivity of its distribution network

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[7] The Commissioner raises similar arguments in support of its decision to centrally value Bell Atlantic Mobile's § 39 property.

depends on the transmission and receipt of radio waves. Further, its switching equipment is far more sophisticated and performs a function unnecessary in the wired telephone industry: monitoring the location of mobile users and switching cellular callers and receivers to different cell sites depending on their location. Accordingly, while the equipment used by RCN was generally the same as any other land-line phone company, albeit adaptable to other uses such as Internet and cable television, Bell Atlantic Mobile's distribution equipment is markedly different, negating a finding that it is "undeniably" engaged in providing telephone service.

Another reason that RCN was found to be "undeniably engaged" in providing telephone service was that RCN was regulated as a telephone company.

> From a regulatory standpoint, [RCN] submitted filings and was granted rights as a telephone company. For example, [RCN] filed an operating Tariff with DTE. Telephone and telegraph companies operating in Massachusetts were required to file Tariffs with DTE. The Tariff filed by the Company identified all of the telephone services that it offered in the Commonwealth. Under the Tariff, [RCN] was required to offer 411 or directory assistance, 911 or emergency service, operator service, and other such services customarily provided by telephone companies. Any revisions to the Tariff had to be approved by DTE. [RCN] also submitted Annual Telephone Returns to DTE in accordance with G.L. c. 166, § 11.

RCN 2003 ATB Findings of Fact and Reports at 425. As will be detailed in sections to follow, Bell Atlantic Mobile is not regulated as a phone company under chapter 166, is not subject to Tariffs and has not filed a telephone company return under G.L. c. 166, § 11 since 1993.

Further, the Court's concern that adoption of an exclusivity test "would act to chill advances in the telecommunication field as new technology becomes available for fear of outpacing the 1915 definition of a 'real' telephone company" (***RCN***, 443 Mass. at 203) is inapplicable to these appeals because wireless mobile communication is not an advancement in telephone technology; rather, it grew out of technological developments in radio technology. Telephone and radio technology grew on parallel but distinct tracks, as detailed in the Findings section of this Report. When § 39 was enacted in 1915, the burgeoning telephone industry and its necessary distribution infrastructure of poles, wires and underground conduits, wires and pipes was spreading across Massachusetts and the country, with approximately six million land-line telephones in use. Section 39 was enacted to address the problems with valuing and assessing this spreading infrastructure; its application to providers such as RCN in the early twenty-first century was still consistent with the legislative goal of enacting § 39, even with the technological advances in the telephone industry that allowed cable television and Internet connectivity signals to travel on the same cables and wires, given the extensive physical infrastructure RCN used in providing telephone and other services.

In contrast, radio communications technology was basically providing one-way communications in 1915 using transmission and receiving equipment that did not traverse municipal boundaries. The technology was being used primarily as ship-to-ship and ship-to-shore communications, and later by police departments, as well as for the broadcasting of programming by networks such as NBC.

When it finally became technologically feasible to offer mobile cellular communications to the general public in the early 1980s, there were over eighty million telephones in use, fiber optic cable offering multiple communication channels for land-line communication had been in use for over fifteen years, and AT&T had been forced to break up into seven "Baby Bells." Despite the rapid de-

velopment of cellular technology since the 1980s, there is still an absence of the physically interconnected multi-jurisdictional distribution infrastructure that was the problem which § 39 was enacted to remedy.

In addition, the Board found in ***RCN*** that RCN, like other wired telephone service providers, was a competitive local exchange carrier ("CLEC") under the 1996 Telecommunications Act, 47 U.S.C. §§ 251-53. ***RCN,*** 2003 ATB Findings of Fact and Reports at 413, 422. The 1996 Act required local exchange carriers ("LECs"), who were the established wired telephone service providers, to enter into interconnection agreements with CLECs to allow them to tie their own wired network into the LEC's existing, broader network. ***RCN,*** 2003 ATB Findings of Fact and Reports at 413. *See also* G.L. c. 166, §§ 13 and 14. The parties agree in the present appeals that Bell Atlantic Mobile in not a CLEC, an LEC, an incumbent local exchange carrier ("ILEC"), or a wired telephone company of any sort.

In ***RCN,*** the Board relied on the extensive similarities between RCN and other § 39 telephone companies to determine that RCN, although providing services in addition to telephone service, qualified as a telephone company for purposes of § 39:

> On the basis of these facts, the Board found that [RCN] used property, provided services, submitted regulatory filings, was granted rights, generated revenue, maintained connections, and allocated resources consistent with classification as a telephone company under § 39. The mere fact that [RCN] provided other services and used progressive technology did not defeat its status as a telephone company under § 39 where its telephone service constituted a substantial part of its business.

RCN, 2003 ATB Findings of Fact and Reports at 429.

The issue presented by the present case is far different from that addressed in ***RCN***. RCN provided the same wired telephone service connecting one stationary user with another, employed the same physical distribution infrastructure, and was regulated by DPU/DTE in the same manner under G.L. c. 166, as any other wired telephone company that qualified for § 39 central valuation. The Board and the Court agreed with RCN that providing other services, in addition to telephone service, should not deprive the company of telephone company status under § 39, where its telephone service constituted a substantial part of its business. ***Id.*** and ***RCN***, 443 Mass. at 204.

That analysis and determination is quite different from the question presented in these appeals of whether Bell Atlantic Mobile, whose service, technology, distribution infrastructure and regulatory environment are markedly different from wired telephone companies such as RCN, is still a telephone company for purposes of § 39. The factual basis for the conclusion in ***RCN*** that RCN was "undeniably" providing telephone service cannot be made in these appeals; it cannot be found in these appeals that Bell Atlantic Mobile "used property, provided services, submitted regulatory filings, was granted rights, generated revenue, maintained connections, and allocated resources consistent with classification as a telephone company under § 39." ***RCN***, 2003 ATB Findings of Fact and Reports at 429. Rather, the analysis of the Court and Board in ***RCN*** concerning the legislative history of § 39 and the factual similarities between RCN and other § 39 telephone companies support the Board's conclusion that Bell Atlantic Mobile is not a telephone company for purposes of § 39.[8]

[8] The Board is aware that this ruling is contrary to an Order of a Board Member issued in consolidated appeals by cellular mobile wireless providers for fiscal years 1991 and 1992 (***Southwestern Bell Mobile Systems, Inc., et al. v. Boards of Assessors of various cities,*** Docket Nos. 188474, etc. and ***New York Cellular Geo-***

Further, § 39 is part of the overall regimen of telephone company taxation in Massachusetts, which also includes G.L. c. 59, § 5, cl. 16(1)(d) (granting exemption for certain machinery owned by, among other entities, incorporated telephone companies taxable under G.L. c. 63, § 52A) and G.L. c. 63, § 52A (governing taxation of certain utility corporations, including telephone companies subject to G.L. c. 166). As the following analysis details, Bell Atlantic Mobile is not a telephone company under any of those provisions, thereby further supporting the Board's conclusion that the taxpayer is not a § 39 telephone company. *See* ***FMR Corp. v. Commissioner of Revenue,*** 441 Mass. 810, 819 (2004) ("Where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose.").

II. CORPORATE UTILITY EXEMPTION

Under G.L. c. 59, § 5, cl. 16(1)(d), a foreign corporation subject to taxation under certain enumerated sections of G.L. c. 63, including § 52A,[9] is exempt from property tax on all of its property other than "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water."

In contrast, under G.L. c. 59, cl. 16(2), business corporations are taxable on "machinery used in the conduct of the business." Accordingly, if Bell Atlantic Mobile is taxable under § 52A and therefore entitled to the exemption under cl. 16(1)(d), the only personal property it owns that would be subject to property tax would be its "machinery used in manufacture" - that is, its electrical generating equipment. However, if it is not taxable under § 52A and is therefore not entitled to the exemption under cl. 16(1)(d), all of its machinery and equipment, including its antennae, transmitters, receivers, amplifiers, and switching equipment, would be subject to tax.

A. G.L. c. 63, § 52A

Section 52A provides that every "utility corporation" doing business in the commonwealth must pay an annual tax on its corporate franchise. A "utility corporation" is defined in § 52A(1)(a) to mean:

> (i) every incorporated electric company and gas company subject to chapter one hundred and sixty-four; (ii) every incorporated water company and aqueduct company subject to chapter one hundred and sixty-five; ***(iii) every incorporated telephone and telegraph company subject to chapter one hundred and sixty-six;*** (iv) every incorporated railroad and railway company subject to chapter one hundred and sixty; and every corporation qualified under section one hundred and thirty-one A of said chapter one hundred and sixty to acquire, own and operate terminal facilities for steam, electric or other types of railroad; (v) every incorporated street railway subject to chapter one hundred and sixty-one; (vi) every incorporated electric railroad subject to chapter one hundred and sixty-two; (vii) every incorporated trackless trolley company subject to chapter one hun-

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graphic Service Area, Inc. v. Commissioner of Revenue, Docket No. 190799). The Order was issued pursuant to a settlement and agreement between the parties and was signed by a single member of the Board. The issue was therefore not fully litigated, nor did the Order constitute a final decision of the Board, which required the vote of a majority of Board members, not a single member. *See* G.L. c. 58A, §§ 1 and 13. Accordingly, the Order does not constitute precedent in these appeals.

[9] Bell Atlantic Mobile relies solely on § 52A, which governs the taxation of utility corporations including telephone and telegraph companies, to support its argument that it qualifies for the exemption under G.L. c. 59, § 5, cl. 16(1)(d).

> dred and sixty-three; (viii) every domestic or foreign pipe line corporation engaged in the transportation or sale of natural gas within the commonwealth; and (ix) every foreign corporation which is not subject to the above chapters but which does an electric, gas, water, aqueduct, telephone, telegraph, railroad, railway, street railway, electric railroad, trackless trolley or bus business within the commonwealth and has, prior to January first, nineteen hundred and fifty-two been subject to taxation under sections fifty-three to sixty, inclusive.[10]

(emphasis added). A review of the public utility corporations enumerated in § 52A reveals a common characteristic: an extensive physically interconnected distribution infrastructure, composed of wires, pipes, conduits or tracks strung over or laid in or under public ways or private property.

Unlike the physical interconnectivity of the distribution networks employed by the § 52A utilities, the CMRS providers' network of cell sites and switching stations are "connected" by radio signals, with a minimal amount of wiring connecting the switching station to the land lines of local telephone companies.[11] Accordingly, Bell Atlantic Mobile's lack of a significant physical distribution infrastructure suggests that it is not a utility corporation for purposes of § 52A.

A utility's extensive infrastructure and other economic, operational, and technical characteristics of its business make it unlikely, if not practically impossible, for a second provider to enter the utility's business, resulting in a "natural monopoly" for the utility, in the absence of governmental intervention requiring access to the utilities infrastructure by other providers. *See, e.g.*, 47 USC § 251 (requiring telecommunication carriers to allow other telecommunication carriers to interconnect with their infrastructure). For example, a gas company will incur a large initial capital outlay to purchase pipes, dig up streets, install pipes and other necessary distribution equipment, and connect to homes. It will also need to secure easements and government permits to install and access its distribution system. It would make little practical and economic sense for a competitor to enter the market and essentially dig up the same streets and private property to lay a set of pipes parallel to the utility's pipes and attempt to gain market share from the utility's customers.

As a result, government typically allows utilities like those listed in § 52A to operate as monopolies, in return for which the government regulates many aspects of the utility, including: its ability to enter a market and construct and maintain its infrastructure; the rates it can charge its customers; and, requiring access to its infrastructure by other providers. *See generally* JAMES C. BONBRIGHT, ET AL., PRINCIPLES OF PUBLIC UTILITY RATES, at 17-25 (2d ed. 1988); 47 USC § 251. Government regulation of utilities is evidenced by the fact that the definition of each utility mentioned in § 52A includes the statute by which that utility is regulated.

The specific definitional reference in § 52A to the regulatory authority by which each utility is governed suggests that entities providing services similar to those offered by the utility, but not subject to the same regulatory statute, are not § 52A utilities. For example, under § 52A(a)(1), electric and gas companies subject to chapter 164 are defined as utilities. Although both electricity and gas are used for home heating, that does not mean that companies

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[10] Bell Atlantic Mobile, organized nearly half a century after 1952, makes no argument that it is a utility corporation under § 52A(1)(ix).

[11] This minimal amount of wiring is apparently owned by the land-line phone companies, given Bell Atlantic Mobile's position that its only personal property subject to tax is its electrical generating equipment.

selling other home-heating fuels, such as oil, coal, or wood, that have no extensive distribution infrastructure and are not regulated under § 164, would qualify as utilities for purposes of § 52A.

Similarly, there are a number of functional substitutes for rail and trolley transportation that do not have embedded physical infrastructures and are not subject to the regulatory statutes referenced in § 52A, including buses, taxis, trucks, airplanes, and boats. However, it is only the enumerated trains and trolleys, regulated under specific sections of the General Laws, which constitute utilities taxable under § 52A.

In an analogous situation, satellite television providers offer a service arguably similar to cable television providers; multi-channel and pay-per-view television programming. While cable television providers, such as RCN, have a physical distribution infrastructure similar to wired telephone companies, satellite television providers use airborne waves, transmitters and receivers to distribute their service. The Board is aware of no instance where satellite television providers have been held subject to the rate and entry regulation of cable television providers under G.L. c. 166A.

The specific section at issue in this appeal, § 52A(1)(a)(iii), requires that a telephone company be "subject to chapter one hundred and sixty-six." Accordingly, chapter 166 must be analyzed to determine whether Bell Atlantic Mobile is subject to its provisions and therefore taxable as a utility corporation under § 52A and entitled to the personal property tax exemption under cl. 16(1)(d).

B. G.L. c. 166

Like G.L. c. 59, § 39 and G.L. c. 63, § 52A(1)(a)(iii), G.L. c. 166 contains no definition of the term "telephone company." G.L. c. 166, § 11, does define the term "company" to include "every person, partnership, association and corporation engaged in the business of transmission of intelligence by electricity." However, this definition provides only that all telephone and telegraph companies, regardless of the company's form of organization, must file the annual return required under § 11, but sheds no light on what constitutes a telephone company. Further, the evidence in these appeals established that cellular handsets do not transmit intelligence by electricity; the electricity used to power the handset does not leave the phone and the "intelligence" is transmitted by radio waves. Accordingly, G.L. c. 166 must be examined to determine whether CMRS providers are subject to its provisions.

Much of chapter 166 has nothing to do with CMRS providers in general or Bell Atlantic Mobile in particular. The first sentence of the first section of chapter 166 states that a telegraph or telephone company "shall not commence the construction of its line" until certain stock subscription and filing requirements are met. G.L. c. 166, § 1. *See also* G.L. c. 166, §§ 2-10 (relating to certain financial requirements referenced in § 1); § 15D (relating to excavation of underground wires or cables); §§ 16-20 (relating to the provision of telegraph services); §§ 21-42B (relating to poles and wires). Bell Atlantic Mobile has no line to construct, underground wires or cables to excavate, telegraph services to provide, or poles or wires.

Bell Atlantic Mobile relies on the annual return requirement under G.L. c. 166, § 11 as principal support for its argument that it is "subject to" chapter 166. Section 11 provides in pertinent part:

> Every telephone or telegraph company doing business in the commonwealth shall annually, on or before March thirty-first or such subsequent date as the department of telecommunications and energy, for good cause shown in any case, may fix, file with said department a report of its doings for the year ending December thirty-first preceding, which report shall be in such detail as the department prescribes, and shall be called the "Annual Re-

turn."

It is not disputed that prior to 1994, the Department of Public Utilities ("DPU"), the predecessor to the Department of Telecommunications and Energy ("DTE") referenced in § 11, required CMRS providers to file an annual return. There is also no dispute that prior to 1994, G.L. c. 159, §§ 12-12D, not Chapter 166, authorized DPU to regulate the rates charged by CMRS providers and required that CMRS providers obtain a certificate of public necessity from DPU prior to offering service in Massachusetts.

On August 10, 1993, the federal Omnibus Budget Reconciliation Act of 1993 was signed into law, amending the Communications Act of 1934 by preempting state and local regulation of commercial and private mobile radio services. In pertinent part, the amendment stated:

> No state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 USC 332(c)(3). The amendment allowed states to petition the FCC for authority to regulate the rates of CMRS providers if the state could demonstrate that market conditions failed to protect subscribers from unjust, unreasonable, or discriminatory rates or the CMRS is a replacement for a substantial portion of the land line services within the state.

In response to the federal amendment, DPU issued DPU Order 94-73. After conducting an investigation and reviewing written comments from interested parties,[12] the DPU determined that:

> Market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory. Also we find that wireless service in Massachusetts is not a replacement for land-line telephone exchange service for a substantial portion of the land-line exchange service within the Commonwealth. Therefore, the Department shall not petition the FCC for authority to continue rate regulation of [CMRS providers] in Massachusetts.

DPU Order 94-73 at 13. On the basis of its findings and conclusions, the DPU ordered that:

> As of August 10, 1994, the Department will no longer regulate the rates of [CMRS providers] in Massachusetts . . . and will no longer regulate the entry of [CMRS providers] into the market. We have found that market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates; these market forces also make it unnecessary for the Department to regulate other terms and conditions of [CMRS] in Massachusetts. Therefore, as of August 10, 1994, the Department will not regulate other terms and conditions of [CMRS] in Massachusetts.

DPU Order 94-73 at 14. In addition to determining that it would no longer regulate rates or entry of CMRS providers, the DPU also repealed its regulations at 220 CMR 35 et seq., promulgated pursuant to G.L. c. 159, § 12B, that governed

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[12] Thirteen CMRS providers provided written comments to the DPU, giving some indication of the level of competition among CMRS providers. DPU Order 94-73, at 2-3.

the procedures by which DPU regulated CMRS providers. DPU Order 94-73 at 15-16.

There is no evidence that Bell Atlantic Mobile filed an annual return with DPU or DTE in any year since 1993. Bell Atlantic Mobile failed to produce such a return at the hearing of these appeals, during discovery despite this Board's Order allowing Newton's Motion to Compel Further Discovery, or through its own witnesses. Further, although G.L. c. 166, § 12 provides for penalties for failure to file the annual return required under § 11, there is no evidence that DPU or DTE took any enforcement action against Bell Atlantic Mobile or any CMRS providers for failure to file a return. In contrast, DTE initiated enforcement actions in 2003 against some forty telecommunications companies for failure to file their annual returns; neither Bell Atlantic Mobile nor any CMRS provider was among those forty.

The fact that between 1988 and 1993 DPU sent Bell Atlantic Mobile's predecessors form returns and an undated and unsigned cover letter or "friendly reminder" that referenced the annual return requirement under chapter 166, and provided excerpts of both G.L. c. 166 and G.L. c. 159, does not establish that CMRS providers were subject to G.L. c. 166, § 11. At most, all this proves is that prior to the federal amendment and DPU Order 94-73, someone at DPU sent forms and a cover letter referencing § 11 to CMRS providers; it proves nothing about whether Bell Atlantic Mobile was at any time subject to Chapter 166. Further, the evidence of record established that the letter and forms were sent out as an administrative or ministerial function and did not constitute a binding determination that CMRS providers were subject to the reporting requirements of § 11 or any other provision of G.L. c. 166. Administrative "missteps" do not constitute an authoritative or persuasive interpretation of a relevant statute. *See* ***BankBoston Corporation v. Commissioner of Revenue***, 68 Mass. App. Ct. 156, 164 (2007) (ruling that Commissioner not bound by language in tax form and instructions).

Accordingly, on the basis of the foregoing, the Board ruled that at no time relevant to these appeals was Bell Atlantic Mobile subject to the annual reporting requirement of G.L. c. 166, § 11 and related §§ 12 and 12A. In addition, Bell Atlantic Mobile has not shown that it was subject at any time to any provision of Chapter 166, which in context clearly refer and relate to wired telephone and telegraph companies. For example, G.L. c. 166, §§ 1-10 concern the financial structure and integrity of a telephone and telegraph company, issues which are important to DPU/DTE in the case of an entity that has a franchise to operate a natural monopoly in an area, but not in the case of a competitive provider where the financial failure of an entity is not a public concern. In addition, there is no evidence to show that DPU ever sought to regulate or enforce the provisions of §§ 1-10 against a CMRS provider.

Further, if CMRS providers were telephone and telegraph companies subject to chapter 166, DPU/DTE would have been obligated to impose utility assessments on CMRS providers pursuant to G.L. c. 25, § 18. Section 18 authorizes the DPU/DTE to assess:

> against each electric, gas, cable television, telephone and telegraph company under the jurisdictional control of the department and each generation company and supplier licensed by the department to do business in the commonwealth, based upon the intrastate operating revenues subject to the jurisdiction of the department of each of said companies derived from sales within the commonwealth of electric, gas, cable television, telephone and telegraph service, respectively, as shown in the annual report of each of said companies to the department.

Bell Atlantic Mobile was not included in the DPU/DTE utility assessment base for the relevant tax year because it did not file an annual return. There

is no evidence that DPU/DTE pursued Bell Atlantic Mobile or any other CMRS provider for failure to file an annual return or that it attempted to calculate Bell Atlantic Mobile's utility assessment by some alternative means. The most reasonable inference from the failure of DPU/DTE to enforce the return filing and utility assessment obligations is that DPU/DTE concluded that Bell Atlantic Mobile and other CMRS providers were not public utilities.

CMRS providers do not fit legally or technologically within the statutory rubric of Chapter 166, which applies to entities distinctly different from competitive telecommunications providers without a physically interconnected infrastructure distribution system. Like the other chapters referenced in § 52A, Chapter 166 is focused on the obligations of a traditional public utility, including: the construction and operation of its physical distribution system (e.g., §§ 21, 22, 22C through 22N, 25 through 27, 36-37, 39-40); its obligation to serve customers "without discrimination" throughout its franchise area (§§ 13, 14); and detailed financial oversight (§§ 1-10). Rather, CMRS providers are more appropriately, and are in fact explicitly, governed by the statutory obligations imposed on all common carriers under G.L. c. 159.

C. G.L. c. 159

DPU/DTE is also charged with regulating common carriers under G.L. c. 159, § 12, which includes regulating "the transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or ***any other method or system of communication***." G.L. c. 159, § 12(d) (emphasis added). It is not disputed that Bell Atlantic Mobile, as a provider of wireless cellular telecommunications services, constitutes a common carrier under G.L. c. 159, § 12(d).

In addition to its general supervisory authority over common carriers, DPU/DTE is specifically authorized to regulate mobile radio telephone utility companies under G.L. c. 159, §§ 12A-12D. A radio utility is defined in § 12A as "any person or organization which owns, controls, operates, or manages a mobile radio telephone utility system, except a land-line telephone utility or land-line telegraph utility regulated by" the FCC. Section 12A goes on to define a mobile radio telephone utility as "any facility within the commonwealth which provides mobile radio telephone service, including one-way mobile radio telephone service, on a for-hire basis to the public, whether or not such mobile radio telephone service is provided on frequencies allocated to the Domestic Public Land Mobile Radio Services and whether or not such facility is interconnected with a public land-line telephone exchange network."

Although the definition includes pagers, there is nothing to suggest that the section is limited to pagers; such a reading would render the rest of the provision superfluous. *See, e.g.,* ***Globe Newspapers Company v. Commissioner of Education,*** 439 Mass. 124, 129 (2003) ("In interpreting statutes, none of the words of a statute is to be regarded as superfluous"). If pagers were the only mobile radio telephone service that constituted a mobile radio telephone utility, the Legislature could clearly have so limited the definition, rather than making clear that pagers were included in the more general definition. *See, e.g.,* ***Commissioner of Revenue v. Cargill, Inc.***, 429 Mass. 79, 82 (1999).

Sections 12A through 12D were added to the General Laws by Chapter 936 of the Acts of 1973, entitled "An Act Placing the Massachusetts Mobile Radio Telephone Utility Companies Under the Jurisdiction of the Department of Public Utilities." The 1973 legislation specifically differentiates between land-line telephone company utilities and mobile radio telephone service providers. For example, § 12A defines a "radio utility" as "any person or organization which owns, controls, operates or manages a mobile radio telephone utility system,, ***except a land-line telephone utility or land-line telegraph utility*** regulated by the United States Federal Communications Commission." (emphasis added).

Further, the regulation of mobile radio telephone utility systems under

the 1973 legislation was made expressly inapplicable to any telephone and telegraph utility already regulated by the DPU. *See* § 12D ("The provisions of sections twelve A to twelve C, inclusive, are not applicable to any telephone or telegraph utility regulated by the department or to the facilities, systems or services of such utilities."). Such telephone and telegraph utilities included New England Telephone Company ("NET"), the major land-line telephone company in Massachusetts at the time the 1973 legislation was enacted. *See* ***Wolf v. Department of Public Utilities,*** 407 Mass. 363, 368 (1990).

In ***Wolf***, the Court clearly distinguished between "telephone utilities" under the 1973 amendment, which it equated with land-line telephone companies, and the mobile radio telephone service providers which the amendment sought to bring within the regulatory authority of the DPU: "Wolf correctly notes that ***telephone utilities such as NET*** are excluded from the application of § 12B, *see* G.L. c. 159, § 12D, and that ***telephone utilities are excluded from the definition of "radio utility" in both G.L. c. 159, § 12A,*** and the transfer regulation, 220 Code Mass. Regs. § 35.02." (emphasis added). The "telephone utilities" excluded from the definition of "radio utility" under § 12A are "land-line" telephone or telegraph utilities.

Moreover, decisions and regulations promulgated by DPU/DTE uniformly cite chapter 159, and not 166, as the source of its regulatory authority. In DPU Order 94-73 discussed above, which terminated state rate and entry regulation of CMRS providers based on the 1993 federal act preempting such regulation, the DPU states clearly that "G.L. c. 159, §§ 12, 12A-12D, provides the Department jurisdiction over [CMRS] in Massachusetts." *See also* DPU Order 93-98 (deciding that CMRS providers "still would be required to file an annual return with the Department pursuant to General Laws Chapter 159, Section 32.").

In DPU Order 95-59-B, the DPU explicitly refers to Chapter 159, not Chapter 166, in describing its residual regulatory authority over CMRS providers after federal preemption. "Rather, the Budget Reconciliation Act did not completely preempt state regulation of CMRS carriers, and the Commonwealth retains meaningful authority under G.L. c. 159 to regulate CMRS carriers." DPU Order 95-59-B at 2. In all DPU decisions entered into evidence by the parties, DPU explicitly refers to Chapter 159, not Chapter 166, as the statutory authority for its regulatory power over CMRS providers.

Similarly, Chapter 159 is the enabling statute by which DPU derives its authority to promulgate regulations governing CMRS providers. G.L. c. 159, § 12B provides that DPU "shall issue rules and regulations governing the issuance of certificates." Similarly, G.L. c. 159, § 12C provides that the DPU "may establish rules and regulations necessary to carry out the provisions of this section." Each and every one of the specific regulations found in 220 CMR § 35.00 *et seq.* specifically refers to G.L. c. 159, § 12B under the heading "Regulatory Authority." None of the regulations found at 220 CMR § 35.00 *et seq.* reference Chapter 166.

The DPU decisions and the regulations promulgated by DPU recognize that Chapter 159 is the source of DPU's regulatory authority over CMRS providers. As the very agency charged with regulating CMRS providers, DPU's interpretation of their own regulatory authority is entitled to weight. *See* ***Greater Media, Inc. v. Department of Public Utilities***, 415 Mass. 409, 414 (1993).

Bell Atlantic Mobile argued that the Board should give weight to the determination of the Department of Revenue, embodied in an April 9, 1999 letter from the Department's General Counsel to representatives of the wireless industry and an April 13, 1999 internal memorandum, and implemented by the Department since that time, that CMRS providers may "reasonably be viewed" as utility corporations subject to Chapter 166 and therefore entitled to the utility exemp-

tion.[13] The 1999 determination, however, represented a change of direction by the Department, which in previous communications with the wireless industry had indicated that based on "changes in both federal and Massachusetts regulation," wireless providers were "not currently subject to Chapter 166." In addition, internal memoranda dated August 21, 1997 ("SAM 97-13") and November 13, 1998 ("SAM 98-17") analyzed the relevant statutes and determined that CMRS providers: were not subject to Chapter 166; were not "utility corporations" under G.L. c. 63, § 52A; and, did not qualify for the utility exemption under G.L. c. 59, § 5, cl. 16(1)(d).

It is clear that the Department's April, 1999 determination that CMRS providers were entitled to the utility exemption was a policy decision to extend the property tax exemption to CMRS providers. Unlike the previous internal memoranda, which thoroughly analyzed the relevant statutory provisions to conclude that CMRS providers were not subject to Chapter 166, both the April 9, 1999 letter and the April 13, 1999 internal memorandum view the issue of whether CMRS providers were regulated under Chapter 159 or Chapter 166 as "not entirely clear" and concluded that it was "reasonable" to view CMRS providers as being subject to Chapter 166.

Departmental pronouncements based on policy determinations rather than statutory analysis are not entitled to weight. *See* ***Bloomingdale's Inc. v. Commissioner of Revenue*** 2003 Mass. ATB Findings of Fact and Reports 163, 189. In addition, regulation of CMRS providers is not an area in which primary statutory interpretation is left to the Department of Revenue. Administrative interpretations of the agency charged with interpreting a statute, if reasonable and adopted contemporaneously with the enactment or amendment of that statute, are accorded weight in interpreting that statute. ***Lowell Gas Co. v. Commissioner of Corps. & Tax'n***, 377 Mass. 255, 262 (1979); ***Ace Heating Service, Inc. v. State Tax Comm'n***, 371 Mass. 254, 256 (1976); ***Assessors of Holyoke v. State Tax Comm'n,*** 355 Mass. 223, 243-44 (1960). However, it is DPU/DTE, not the Department of Revenue, who is charged with interpreting the statutes regulating telecommunications companies. Finally, interpretations which are not consistent with the underlying statute are not accorded weight. *See* ***Massachusetts Hospital Association, Inc. v. Department of Medical Security***, 412 Mass. 340, 346 (1992) ("an incorrect interpretation of a statute . . . is not entitled to deference").

Accordingly, for all of the foregoing reasons, the Board ruled that CMRS providers are regulated as common carriers, *i.e.* mobile radio telephone utilities, under Chapter 159, and not as telephone company utilities under Chapter 166.

Although the inevitable conclusion of the Board's analysis of the foregoing statutes is that Bell Atlantic Mobile does not qualify for the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d), such a ruling in these appeals would be inappropriate, given the Board's ruling that Bell Atlantic Mobile is not a telephone company and that § 39 therefore does not apply. Such a ruling would be appropriate and warranted if it were found that § 39 was applicable and it is certainly appropriate for the Board to have so ruled in the § 65 appeals, which are not at issue in the Board's § 39 Decision and these Findings.

Rather, for purposes of these appeals, the Board analyzed the corporate utility exemption, as well as G.L. c. 63, § 52A and Chapter 166, to determine the overall legislative treatment of telephone companies for purposes of taxation and regulation. Reading these statutes together, the Board ruled that Bell Atlantic Mobile simply does not fit within the concept of "telephone companies" governed by these provisions. *See* ***FMR Corp. v. Commissioner of Revenue,*** 441

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[13] The Commissioner's denial of the corporate utility exemption in these appeals is based on its status as an LLC, not because it is a CMRS provider.

Mass. at 819 (Where "two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose.").

Accordingly, for all of the foregoing reasons, the Board ruled that the proper interpretation of G.L. c. 59, § 5, cl. 16(1)(d), G.L. c. 63, § 52A, and G.L. c. 166 supports the Board's conclusion that Bell Atlantic Mobile is not a "telephone company" for purposes of G.L. c. 59, § 39.

III. CONCLUSION

On the basis of the foregoing, the Board ruled that as a CMRS provider, Bell Atlantic Mobile is not properly classified as a telephone company under § 39, based on the language of § 39 and its legislative history as interpreted by the Court and Board in ***RCN***. Further, interpreting related provisions concerning the taxation and regulation of telephone companies supports this conclusion.

Bell Atlantic Mobile is not a telephone company subject to taxation under G.L. c. 63, § 52A because it is not a "utility" with an extensive physically interconnected distribution infrastructure and was at no time subject to Chapter 166. Further, Bell Atlantic Mobile was not subject to Chapter 166 because its provisions are applicable to land-line telephone companies and DPU/DTE was authorized to regulate CMRS providers under Chapter 159, not Chapter 166.

Accordingly, for all of the foregoing reasons, the Board ruled that Bell Atlantic Mobile is not a telephone company subject to central valuation of its machinery, poles, wires and underground conduits, wires and pipes under § 39. The Board therefore issued decisions for the appellee cities and towns in docket numbers C267959 through C268176, C269027 and C269028 and a decision for the appellant Assessors of Newton in docket number C269569.

THE APPELLATE TAX BOARD

By:_____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:_____
Assistant Clerk of the Board